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Basic Democratic Rights and Global Institutional Responsibilities: Democracy, Development, International Law, and Transitional Justice

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This dissertation entitled:

*Basic Democratic Rights and Global Institutional Responsibilities: Democracy,
Development, Transitional Justice, and International Law*

by Eamon T. Aloyo

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Date 31 October 2011

*The final copy of this thesis has been examined by the signatories, and we
find that both the content and the form meet acceptable presentation standards
of scholarly work in the above mentioned discipline.*

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Basic Democratic Rights and Global Institutional Responsibilities: Democracy, Development, Transitional Justice, and International Law

Thesis directed by Associate Professor Steven Vanderheiden

Dissertation Abstract

If the practical effects of advancing the developmental and humanitarian aims of human rights are to be realized, the assignment and enforcement of institutional responsibilities for human rights must be improved. I defend this claim through normative and empirical arguments based on nonideal conditions that draw on aspects of political theory, international relations, comparative politics, and international law. Specifically, I defend an approach to justifying human rights by arguing that if everyone possesses an individual right to democracy, in order to actually exercise this right, a number of other rights must be guaranteed. In this way I present a unique approach to derive a list of human rights, which I then build on in the next four chapters. By drawing on just war theory and debates about the limits to state sovereignty, and by criticizing instances of coercive nonmilitary actions, I reconcile communitarian views on state sovereignty with others' emphasis on individual human rights. Through this discussion, I construct a theory of when nonmilitary humanitarian intervention, such as economic sanctions, is morally and legally permissible. Next I suggest that the International Criminal Court (ICC) can and should hold responsible individuals morally and legally culpable of nonviolent crimes against humanity, and that doing so may mitigate the resource curse. Fourth, I argue that because international criminal law is different in kind from domestic criminal law, the ICC should pursue a policy of deterrence, which can best be achieved by indicting nonviolent and subordinate international criminals in addition to supremely powerful violent ones. Finally, by exposing the lack of victim input and nondemocratic decision-making in the leading theories of transitional justice, I construct a democratic institutional account that is sensitive to the diversity of societies in transition. I conclude that if there is an individual right to democracy, then institutions can and should take steps to better guarantee individual rights, and this can be accomplished even under nonideal conditions.

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Introduction

Despite graphic media coverage, American policymakers, journalists, and citizens are extremely slow to muster the imagination needed to reckon with evil.

– Samantha Power (Power 2002: xvii)

We fail to exercise our imaginations in two ways. At the personal level, we eschew empathizing with distant others who suffer or who cause suffering. We do not want to acknowledge that other people, in whose shoes we could have stood, would act in such horrific ways towards one another (Power 2002: 34 and *passim*). Especially when thinking too much about serious global problems might require an effort on our part or cost us something, many avoid it (Power 2002: 506). Another failure of imagination (among other sorts) is at the institutional level. Despite the

progress we as a species have made in some areas – witness the Internet, penicillin, airplanes, smart phones, representative liberal democracy, and much more – reformers have not been creative and clever enough yet to invent practicable institutions that can yoke the sinister aspects of human nature to, as the 1948 Genocide Convention says, consistently “prevent and punish” that crime and other human made catastrophes (Genocide Convention 1948: Article 1; Power 2002: *passim*). This dissertation is in part a reply to both failures of imagination. I personally explore some of the worst human actions and intentions by engaging with scholars who work on related topics in order to imagine new theories, principles, strategies, and institutions. While no dissertation can fully answer either the personal or the institutional charges, I provide theoretical as well as practical guidance on the sorts of issues with which Power is concerned.

I do so by engaging with the centuries long and yet still incomplete project of justifying and protecting individual rights. This project dates from at least the time of Locke in the 1600s and continues today (e.g., Locke 1689 [1992]; Hunt 2007; Glendon 2001; Griffin 2008; Beitz 2009; Donnelley 2003; Christiano 2011). We have made progress since Locke’s time. Many states have institutionalized the protection of individual rights through their constitutions. The UN popularized human rights with the UN Universal Declaration of Human Rights (UDHR) of 1948. The spread of democracy over the 20th century has extended an institutional means of protecting human rights over much of the globe, although the institutions are territorially limited and far from a human rights panacea (Davenport 2007; Sen 1999b). In response to global governance failures identified after WWII, the

international community has constructed key institutions including the UN and International Criminal Court (ICC) that aim in part to protect human rights and punish their worst violators.

But in the decades since the UDHR and even with the realization of ICC, we have still not been creative enough to imagine (a) one or many principled justifications for human rights that can attract a version of Rawls's idea of an "overlapping consensus" (Rawls 1971 [1999]: 340; Rawls 1993: Lecture IV), (b) principles for strategies of existing institutions to adequately protect human rights or (c) new institutions that consistently adequately protect human rights. Scholars have offered a number of original and interesting proposals for each of these topics, which I discuss below. But much theoretical and practical work remains to be done if the aims of the human rights movement are to be realized. This dissertation contributes to this work by engaging with the debates on (a)-(c) through addressing the following three questions. First, is there a theory of human rights that improves upon existing justifications that may improve the guarantee individuals' human rights? Second, are there any new, principled, realistic strategies that existing institutions might adopt that would better protect human rights? Third, do principles for protecting human rights require any new politically feasible institutions?

All three questions are practically important. I briefly defend this claim by giving a few related examples for each of the three questions. To illustrate the first point, that ideas can shape policies for the better or worse, take the British effort to end the slave trade (for another example see Philpott 2001). Although the UK's

efforts to end the trade cost their economy up to 2% of GDP per year for 60 years (Kaufmann and Pape 1999), reformers succeeded in abolishing the slave trade. They did so primarily by using the power of ideas. Activists convinced others that slavery was deeply wrong and pressed for legislation and action to eradicate the trade through the partially democratic British government of the day (Hochschild 2005). Conversely, people can use principles to excuse failing to guarantee human rights. Take the principle of nonintervention, a foundation of state sovereignty, which proscribes states from interfering in the internal affairs of other states especially through the use of force. This principle is now embodied in international law through the United Nations (UN) Charter. During the Armenian genocide, the US ambassador to the Ottoman Empire, Henry Morgenthau Sr., urged Washington to do something about the massacres. But then he wrote “I realize that I am here as Ambassador and must abide by the principles of non-interference with the internal affairs of another country” (as quoted in Power 2002: 8). The inaction of the US and other major powers permitted the Ottomans to murder over one million Armenians (Power 2002: 13).

Second, I must show that strategies of institutions can improve or undermine the protection of human rights and that strategies can be driven by principles. One example is Morgenthau’s deplorable use of principles to form US strategy that I just discussed. Another example is how the UN Security Council (UNSC) decides to exercise its power. In one case, the UNSC imposed sanctions against Iraq from 1990 to 2003 that killed half a million people, chiefly children (Gordon 2010: 37, 87, n82; see chapter 2 of this dissertation). By advocating for the sanctions, the US had

ostensibly wanted to limit Saddam Hussein's ability to acquire weapons of mass destruction (WMD). When presented with evidence showing the human devastation of the sanctions, the US's callously continued to press its policy at the UNSC. This response shows the vital importance of correctly designing the structure of every powerful institution so that even ones built for humanitarian purposes cannot be hijacked by the powerful to serve their own ends.

Third, just as the reformers after WWII adopted institutions such as the UN in order to avoid repeating the devastation and the human rights abuses of that war, we would do well to ask what new institutions may be required to further protect everyone's human rights. Some might object that just a shift in resources is needed – perhaps to improve governance, alleviate poverty, or to improve humanitarian interventions. Redistributing resources would undoubtedly help. But since WWII the institutions that were in part created to protect human rights have failed far too many despite great shifts in resources and priorities. Witness the Khmer Rouge, Mao, Stalin, Guatemala's civil war, the Rwandan genocide, the war and genocide in the Balkans, Congo's wars, and now Sudan's atrocities, to name just a few. My claim is not that new institutions are the only feasible way to improve the protection of human rights; my claim is that new institutions are one way to improve protecting human rights, and that other approaches are unlikely to be sufficient to protect human rights to an adequate degree. Are new institutions possible? Yes. Naysayers need only to look to the creation of the ad hoc tribunals for Rwandan and the former Yugoslavia, the ICC, and to the spread of domestic democratic institutions over the 20th century for evidence.

I draw together the three questions from above by engaging political theory, international relations, comparative politics, international law, transitional justice, and global governance scholarship. I address the first question in chapter 1 by arguing for a basis for human rights grounded in democratic theory. I narrow the second and third questions to a few issues so that I can carefully address them with the full consideration each is due. These issues include when violating state sovereignty through nonmilitary humanitarian intervention is permissible (chapter 2) and what principles we should use to guide the policies of the ICC (chapters 3 and 4) in order to improve the protection of human rights. In the final chapter I argue for a new, fairer, transitional justice institution that sometimes allows for democratic input from a *demos*, but at the same time protects the *demos* from the possible harms by still powerful human rights abuses of the past regime (chapter 5).

Before situating these contributions in the literature, which I do in the sections that follow, I make clear some of my assumptions and definitions. I accept some fundamental ideas of liberalism such as all individuals should be considered of equal moral worth and any restrictions of individual liberty must be justified. While I personally believe that everyone deserves a robust list human rights such as those enumerated in the UDHR, to build my argument I accept just one individual right. I assume that every adult has an individual right to participate in a representative democracy (see chapter 1; UDHR #21). By a right to democracy I mean that everyone has a procedural moral right to vote and to some minimal opportunity to politically influence others in a popularly sovereign representative system. I do not claim that this right is more morally important than other rights, such as the right to

life, some amount of health care, or personal security. As I discuss further in chapter 1, I choose to build my argument on this right because it is a way to show what substantive individual rights democrats must be committed to. Since I do not argue for why I believe everyone deserves a democratic right, let me briefly note two methods of justifying an individual right to democracy. Individual rights to democracy can be defended by instrumental or intrinsic means. Democracy is instrumentally important because the more democratic a country is, the more likely it is to protect its citizens' (other) rights (Davenport 2007; Sen 1999: chapters 6 and 7; Christiano 2011). One reason democracy is intrinsically important is because expressing one's preferences through the democratic process is a way to exercise one's autonomy (Held 1995, 2006; Griffin 2008). James Griffin writes that "autonomy is self-legislation," among other individual level choices (Griffin 2008: 243). Griffin correctly notes that democracy is intrinsically important for exercising a type of (collective) autonomy. The reader can accept that individuals have a right to democracy for any plurality of reasons, intrinsic, instrumental, or other. Even if a reader disagrees with the assumption that all adults have a moral right to democratic participation, all is not lost. She can discard this assumption and yet still be convinced by chapters 3 through 5 because these chapters are founded on other assumptions. For those chapters, one need only accept that some list of individual rights or individual welfare is extremely morally important.

Another important distinction I draw is between violent and nonviolent harms. I have in mind commonsense notions of both terms. Violence includes the direct and immediate use of physical force such as killing or harming with bullets,

shells, rocket propelled grenades (RPGs), bombs, knives, beatings, physical torture, and so forth. I define nonviolent wrongs negatively, as all those wrongs that are not violent. Such wrongs include stealing, withholding medical care when it is one's duty to provide it, or purposively starving people. One might think that the main difference between violent and nonviolent harms is that violent ones are all acts whereas all nonviolent ones are omissions, but this is wrong. Violent and nonviolent wrongs can be acts or omissions. For instance, a military commander who does not discipline his troops for committing violent atrocities, and whose troops continue to commit atrocities because they are not disciplined, commits a wrong of omission that results in violence. Conversely, a powerful politician who has a duty not to plunder state resources can commit a nonviolent wrong by an act such a major corruption. Although I discuss both violent and nonviolent harms, I concentrate on nonviolent ones because they have generally received less attention and because some nonviolent harms are more morally blameworthy and affect more people than do violent harms. The sorts of nonviolent harms that primarily concern me throughout the dissertation are those that rise to the level of international crimes (which I discuss in chapter 3).

In the remainder of the introduction I situate my work in the bodies of scholarly literature of human rights, institutional responsibility, state sovereignty, democratic theory, international development, and international law. I end by providing a brief synopsis of each chapter.

1. Theories of Human Rights

In this section I briefly review some prominent theories of rights and indicate how my arguments about human rights fit into this discussion. Rights have a centuries old history. As a modern invention (Constant 1819 [1988]; MacIntyre 1981 [1984]: 69; cf. Miller 1995: Chapters 4, 9, and *passim*), rights assume a central place in contemporary political theory. But their foundations are controversial. Indeed, whether any rights exist at all is contested. Many but not all Utilitarians – exemplified by Jeremy Bentham’s famous statement that rights are “nonsense” – reject the very existence of rights. Utilitarians present powerful alternative arguments for why humans should be treated in certain ways, and why specific individuals have certain responsibilities. Some non-Utilitarians, such as Karl Marx (1844 [1978]) who suggest that liberal rights are inadequate to achieve human emancipation, and Sonu Bedi (2009), critique individual rights as well. At the other end of the debate on rights, Hobbes, Locke, and others claim that everyone is endowed with “natural” rights (Hobbes 1651 [1994]; Locke 1689 [1988]). Like natural rights, human rights apply to every human (even if natural rights were applied selectively in practice, excluding women, blacks, and colonized peoples for instance).

Because scholars defend divergent lists of human rights, it impels us to question the basis or bases for human rights. Indeed, even if there were agreement on an inventory of rights, we should still ask what justification there is for such rights because all existing justifications could be mistaken or a better justification could exist. Besides these justifications mattering theoretically, they practically

matter because new justifications could convince holdouts who now reject human rights. These holdouts, in turn, could improve the protection of individuals' rights. New ideas may take decades or centuries to have practical effects so the consequences of novel arguments may take a frustrating long time to be realized.

One popular method for justifying individual rights is the following. Thinkers have typically appealed to a human characteristic that they argue is important and universal enough to be protected by human rights (for an overview see Beitz 2009: chapter 3). For instance, thinkers have used agency (Griffin 2008; O'Neill 1987), interests (Caney 2007), autonomy (Raz 1986), dignity (Perry 1998; Nickel 2007), capabilities (Sen 1979, 1999, 2005; Nussbaum 1997, 2000, 2006, 2011), and reason (Gerwith 1996) to justify individual rights. Jacques Maritain, one of the authors of the UDHR, offered another way to reach agreement on a list of rights. In the 1940s he said that "we agree about the rights [in the UDHR] but on the condition no one asks us why" (as quoted in Glendon 2001: 77, see too 147). Reminiscent of Rawls's "overlapping consensus" (Rawls 1993: Lecture IV), Maritain's approach worked practically to gain consensus on the UDHR, but fails to provide a principled justification for human rights. Charles Beitz defends a third approach (2009). Beitz argues that human rights are grounded in their practical uses and interpretations.

My approach draws on Henry Shue's instrumental strategy of defending rights, which is an influential and convincing contribution to a theory of universal rights (Shue 1996). "Basic rights," he argues, are those rights that are necessary to exercise all other rights (Shue 1996; see too Beitz and Goodin et al 2009). Instead of using a unique human characteristic, such as dignity or agency, (in chapter 1) I

begin with a procedural right to democracy, and suggest that to exercise that right, other substantive rights are required (see Beetham 1999: chapter 5). To illustrate my debt to Shue, I call the rights I defend “basic democratic rights.” By basic I mean something somewhat different than what Shue means, namely that these rights are necessary to exercise other rights. I add “democratic” to show what they are basic in reference to.¹ Basic democratic rights in other words are those rights that are required to exercise procedural democratic rights. In addition to his argument about basic rights, Shue developed a sophisticated theory of responsibilities concomitant to basic rights (Shue 1996: chapter 2). I turn next to this topic of responsibility.

2. Institutional Responsibilities For Human Rights and State Sovereignty

If the debate about which universal rights exist appears controversial, the discussion about the responsibility to guarantee any of these rights is just as contentious (O'Neill 2004). Thus emerges the second broad question of this dissertation: assuming that human rights exist, what principles should guide the strategies of the institutions that are assigned responsibility to guarantee them? I begin with the discussion of why rights require correlative duties bearers, then examine the assignment of institutional responsibility for these rights, and finally briefly discuss why some types of responsibility for human rights require violating state sovereignty.

¹ Technically they should be called “representative basic democratic rights” because some of the rights I argue for in the dissertation may not be necessary for direct, and perhaps other types of, democracy. But I drop “representative” in the remainder of the dissertation because the whole phrase is unwieldy. One other caveat: I use “basic” in a similar but distinct way from Shue. Shue takes basic to mean necessary to exercise *all* other rights, whereas by basic I mean required to exercise just the right to democracy.

One has a claim rights to X if one is “at liberty in respect to X” or in other words “has no duty refrain from or relinquish X” as well as others having the duty to not interfere with one’s liberty to X (Feinberg 1970b: 249). Claims rights require duty bearers because without these duty bearers, it be unclear against whom one could exercise one’s claim right (Feinberg 1970b; cf. Nussbaum 1997/8: 274). Onora O’Neill puts the point as follows:

Rights are seen as one side of a normative relationship between right-holders and obligation-bearers. We normally regard supposed claims or entitlements that nobody is obliged to respect or honour as null and void, indeed undefined. An understanding of the normative arguments that link rights to obligations underlies daily and professional discussion both of supposedly *universal* human rights, and of the *special* rights created by specific voluntary actions and transactions (treaty, contract, promise, marriage etc.). There cannot be a claim to rights that are rights against nobody, or nobody in particular: universal rights will be rights against all comers; special rights will be rights against specifiable others (O’Neill 2005: 430).

Many human rights require individuals to be duty bearers. Individual rights to security and private property proscribe everyone from killing, harming, and stealing, for example. But claims can be made against institutions as well as against individuals. Individuals cannot bear all of the duties correlative to human rights because some rights, such as the rights to due process and to education, would require more from an individual than she can and should be required to provide.

Although political theorists and scholars of international relations have grappled with issues of global concern and individual rights for centuries, the touchstones for today's debates about institutional responsibilities emerged in the 1970s. One point from John Rawls's renowned 1971 book, *A Theory of Justice*, is especially important for us here (Rawls 1971 [1999]). Rawls drew a distinction between *justice*, which applies to institutions, and *ethics*, which applies to individual conduct (Rawls 1971 [1999]: 3, 6-7), that scholars continue to use (Pogge 1989: 17; Pogge 2010: 16; Pogge and Moellendorf 2008: xx; Rubenstein 2009: 526; Murphy 1998). My arguments primarily deal with global institutions, situating my work within a justice framework even though I do not develop a theory of global justice.

One debate within the justice side of Rawls's distinction is how responsibilities to guarantee human rights should be allocated between local, state, and global institutions. Contemporary discussions of this debate date to Charles Beitz's cosmopolitan challenge to Rawls's state based framework (Beitz 1975; 1979 [1999]). Beitz argued there is no reason that Rawls's arguments should be limited to a state's borders and should therefore apply globally. Despite Beitz's and others' arguments, the prevailing view still is that states have the primary duty to guarantee the rights of their citizens within their territory. Beitz states this consensus view in a 2009 book: "the central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventative action by the world community or those acting as its agents" (Beitz 2009: 13, see too Chapter 5). The remedial or preventive action of which Beitz

writes can be termed “secondary responsibilities.” These are responsibilities that shift to other actors if and when those tasked with primary responsibility fail in their duties. These secondary responsibilities for human rights fall on international and global institutions. Institutions already exist that can and should take responsibility to assist in “remedial and preventative action[s]” (see, e.g., Barry and Pogge et al. 2005). I accept the view that states are primarily responsible for guaranteeing their citizens’ rights, and that other international institutions are secondarily responsible. I accept this view not because I agree with the normative foundation of states² but because we must start somewhere, and because I am interested in contributing to realistic reforms of global institutions in the near term. Institutions that have secondary responsibilities include, and in different chapters I concentrate on, the responsibilities of the ICC, UN, other states, and non-state actors. The ICC is especially interesting because as one of the youngest global institutions its powers have not been fully explored or utilized. Because of its practical potential and theoretical interest, I devote two chapters to the ICC’s responsibilities.

To make arguments about this second level of responsibility, I must give reasons for why actors can violate a state’s sovereignty under certain conditions (see chapter 2). There are two main positions in the literature on when violating state sovereignty is permissible. Michael Walzer defends a strong position of state sovereignty by arguing that collective self determination is a sufficiently important

² In fact I am convinced by Robert Goodin’s (2007) radical position that the “all affected interests principle” requires almost everyone to have a say in almost every decision, undermining the legitimacy of states. Although Goodin does not directly address my question of responsibility for human rights, if his argument is sound, it could undercut the consensus that states should have primarily responsibility to guarantee human rights because it undermines the moral justifications for states.

good that only when there are egregious and widespread violations of human rights, such as genocide, crimes against humanity, war crimes, or widespread slavery, can sovereignty be justly infringed (Walzer 1977, 1980). His critics, including David Luban, Charles Beitz, and Michael Doyle, set a lower bar for when violating state sovereignty should be permissible (Beitz 1980, 2009; Luban 1980a, 1980b; Doyle 2009). Whenever human rights are violated, they suggest, the presumption against violating state sovereignty is weakened. This does not mean that sovereignty can be violated whenever a state is unable or unwilling to guarantee its citizens human rights because other considerations, such as proportionality, matter. In chapter 2, I make an argument that heavily weighs one argument in favor of sovereignty, the individual right to participate in democratic collective self-determination, but conclude that other substantive human rights are what matter morally even if one takes a Walzerian stance. This lays the groundwork for suprastate institutions to play a more active role in protecting human rights. To justify these interventions, as I mentioned above, I rely on democratic theory.

3. Democratic Theory

In this section I review and locate my work within the democratic theory literature on how and why democratic power can be limited, and how representative democracy should be defined. I am especially interested in the required components of representative democracy (e.g., Beetham 1999: chapter 1) and their relationship to the limits of democratic power needed to prevent a tyranny of a majority and to protect individual rights (Locke 1689 [1988]; Mill 1859 [1992])

Chap. 1, §4; Tocqueville 1835 [1994]: Vol. 1, Chap. XV; Madison 1787 [2003]: Federalist # 10).

The ancient Greeks' practices of, and Rousseau's theoretical contributions to, direct democracy left little room for individual rights or indeed any constraints on the electorate's law making powers (Held 2006: Chapter 1; Rousseau 1762 [1992]). Placing more emphasis on the individual than the ancients did, many modern thinkers defended representative democracy and took up the vital question of how democratic power should be limited (e.g., Locke 1689 [1988]; Held 1995: 9-12). Madison identified the central problem as follows: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself" (Madison 1787 [2003]: Federalist # 51). To guard against abuse of power by the powerful, the Federalists developed a system of divided government. "Ambition must be made to counteract ambition," Madison wrote (Madison 1787 [2003]: Federalist # 51). The Federalists in another way limited government power through the Bill of Rights. That such gifted writers and resolute politicians failed to protect the rights of women, blacks, Native Americans, and others demonstrates that the challenges today's thinkers and reformers face is nothing new.

Less than a century after the Federalists wrote in defense of the US Constitution, John Stuart Mill in *On Liberty* addressed how and why government (and social) power and influence should be limited (Mill 1859 [1992]). In a celebrated defense of individual liberty, Mill argued that there should be a sphere of individual life free from government as well as social control. Liberal democrats

from Locke (1689 [1988]) to Brettschneider (2007) and Terry Macdonald (2008) believe that individual autonomy should be at least one limit on democratic power and individual autonomy can be protected by a number of individual rights. Other democratic thinkers further explored the relationship between rights and democracy, often drawing some connections between them (Dahl 1985: 170-1; Walzer 1981 [2007]: 13; Beetham 1999: chapter 5; Shapiro 1999: 40; Brettschneider 2007). The variations of liberal democracy provide more individual rights than versions of democracy the ancients practiced and that Rousseau formulated. Liberal democrats start with individual level principles to construct institutions and justify limiting their power. My argument moves in same direction, from an individual right to limits on democratic power, but starts with just one right instead of liberals' acceptance of many substantive individual rights. This minimal assumption that I start from has the advantage of convincing liberal as well as non-liberal representative democrats. Although I share some fundamental assumptions of liberalism, for the purposes of this dissertation I do not share the liberal assumption that everyone possesses a fairly long list of substantive individual rights.

Traditionally, liberal democrats concentrated on limiting the power of a state internally, but recently some have begun to argue that rights violations external to a polity should also be considered when assessing how democratic power should be limited and how legitimacy should be assessed (Altman and Wellman 2009: 3-4, 148-9; Buchanan 2011). Human rights violations occur in part because of the incentives globalization, and state and global institutions, create. Thus my arguments engage with some of the literature at the intersection of democratic

theory and globalization (Held 1995, 2010; Goodhart 2005; Gould 2004; Dahl 1999). Rather than asking whether any sort of global democracy is possible and preferable to all alternatives, I ask what the prerequisites are for any sort of democracy, whether local, national, or global, and how these rights might be guaranteed given today's global order. Globalization and the global institutions we invent present a paradox for democratic theory: globalization undercuts democratic possibilities by both contributing to undermining human rights and diffusing the impact of a state's decisions to those far beyond who have a say in it, while at the same time providing unparalleled opportunities to peacefully promote the prerequisites of democracy (see Held 1995: 21 and *passim*, 2010: 143). To attend to these issues, I develop arguments that address the global order and which have implications for international development.

4. International Criminal Law and International Development

In this section I review a few leading theories of development and a few areas of international law to suggest that scholars and practitioners interested in international development could achieve their aims more effectively if they drew on international law as well as their standard methods. This supposes that development specialists do not currently use international law in their practical or theoretical work. While it is possible to show that something does not exist or did not happen, when one must examine a very large number of items, adequately supporting a negative claim can be quite difficult (Eakin 2002). Thus I show a few leading theories development do not incorporate international law. I propose to use

the instrument of international criminal law in a novel way to deter and punish such crimes and thereby promote development.

Scholars of development ask two main questions. First, they ask how should we define development and how should we measure it (Sen 1979, reprinted in Sen 1992: chapter 1; 1999; Nussbaum 2000, 2006, 2011)? Second, they ask what causes (under)development and how can development be improved (Glaeser et al. 2004; Easterly 2009; Svensson 2005; Mauro 1995; Ross 1999, 2001; Sachs and Warner 2001; Humphreys, Sachs and Stiglitz et al. 2007; Uvin 1997, 2004; MacGinty and Williams 2009; Terry 2002; Chambers 2005; World Bank 2011; Easterly 2001; 2006; Sachs 2005)? Pogge correctly notes that “these are, for the most part, ‘nationalist’ explanations which trace flaws in a country’s political and economic institutions and the corruption and incompetence of its ruling elite back to this country’s history, culture, or natural environment” (Pogge 2002: 112). Aside from colonial arguments to explanation under development (e.g. Acemoglu, Johnson, and Robinson 2001) and debates about the morality of sweatshops (e.g. Bhagwati 2004: 170-8), development thinkers largely exclude global analyses in general and international law in particular as explanations for and means to improve development. There are a few exceptions, such as Pogge (2002), that I discuss below.

At the same time that development scholars engaged in these debates, international criminal law (ICL) has taken great leaps forward. Although the Nuremberg trial was of questionable legality based on *nullum crimen sine lege* reasons, it set the groundwork for later reforms and institutions (Altman and Wellman 2004). After the Cold War ended, actors created new international

criminal law institutions (Struett 2008: 25, 55, and *passim*). In the 1990s the UN established two ad hoc tribunals, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). After decades of discussions and years of negotiations, the first ever permanent international criminal court was agreed upon in 1998 and came into force in 2002. The ICC's jurisdiction is limited to four core crimes: genocide (article 6), crimes against humanity (article 7), war crimes (article 8), and, starting in 2017, aggression (Rome Statute 1998; Scheffer 2010). It is widely accepted that most of these crimes require violence, and only violent criminals have been indicted as of October 2011.

Some examples are helpful in understanding the connection between international law and the types of human made harms that set back development. Mao killed at least 45 million with his "Great Leap Forward" most of whom died from starvation (Dikötter 2010). Stalin starved to death 7-10 million people in Ukraine in the 1930s (Pogge 2007: 15). Ethiopia's rulers killed at least 1 million in the 1980s using food as a weapon (Meredith 2005: 343). As of August 2011, a non-state militant group, Al Shabab, is causing a famine in Somalia by obstructing humanitarian organizations from reaching those in desperate need. These cases show that nonviolent actions can be just as harmful as the typical methods of warfare.

Despite the great effect these horrible nonviolent types of governance have had on individuals, the fields of international development and international law, let alone ICL, progressed without much cross-fertilization. There are a few scholars, however, who do explicitly link international law to development. Thomas Pogge's

work on the “borrowing privilege” and the “resource privilege” (Pogge 2002) and Leif Wenar’s work on the resource curse (Wenar 2008, 2010) suggest that international law is one important explanation of underdevelopment. Sonja Starr (Starr 2007) and David Marcus (Marcus 2003) propose that some types of nonviolent harms should and do qualify as international crimes. Pogge contends that international property rights laws creates incentives for national level politicians and rebels to govern badly because the international regime allows anyone – dictators or democratically elected politicians alike – to sell a country’s natural resources and borrow internationally in that country’s name. These international laws create perverse incentives because they encourage leaders to stage coups or civil wars to grab the lucrative prize of state power. These laws create incentives for dictators to hold onto power as long as possible to profit as much as possible, too. Starr argues that acts of major kleptocracy qualify as a crime against humanity and Marcus argues that some types of purposive starvation qualify as an international crime. Yet these innovative arguments rule out most types of nonviolent widespread harms as crimes under international criminal law, and indeed most types of nonviolent widespread harms are currently not considered international crimes under the ICC. One exception is that purposive mass starvation could qualify as genocide. But the stringent intent requirement and because only targeting groups based on national, ethnic, religious, or racial characteristics can qualify as genocide, this still excludes many terrible non-violent actions. Most take the crime against humanity section of the ICC to not include nonviolent crimes (cf. Marcus 2003; Starr 2007). And the problem with using war crimes to indict

nonviolent offenders is the conflict nexus requirement, excluding any nonviolent harms that occur during peacetime or outside of conflict areas.

I use Pogge's and others' analyses to criticize aspects of Wenar's and Starr's arguments to develop an alternative proposal grounded in the ICC's definition of crimes against humanity to ameliorate the resource curse. By moving our conceptualization of some nonviolent widespread of systematic harms of acts and omissions out of the realm of legal permissibility and into the realm of individual criminal responsibility (even if many individuals are responsible), I refocus our attention on the causes of some types of human rights violations (Sen 1981, 1999a; de Waal 1997; Starr 2007; Marcus 2003).

Another potential intersection of ICL and international development is the peace versus justice tradeoff (see chapter 5). A tension can exist because alleged international criminals can often wield enough political power to credibly threaten to upset the peace if endangered by criminal prosecution. Because there are multiple types of justice (retributive, restorative, transitional, etc.), the tradeoff is more precisely put as a tension between *retributive* justice and peace. This potential conflict sets two goods, protecting human rights or peace, and retributive justice, in tension with one another. One might imagine that international development practitioners would argue for peace because their aim is to keep people alive and well, whereas lawyers may prefer retributive justice because the rule of law requires consistent prosecution. Conversely, development practitioners that integrate mental health into their theory of development might push for retributive justice if that is what their constituents prefer (e.g. Farmer 2005: 4). Indeed,

whether peace or justice is preferable is a central transitional justice debate (Rotberg and Thompson et al. 2000; May 2004: chapter 13; Kerr and Mobekk 2007; Teitel 2000: 51-66). Yet as Mark Drumbl (2007) suggests, ICL differs from domestic law in important ways. Individuals pressing for international prosecution must assess the likely consequences of a prosecution unlike domestic prosecutors who can generally safely assume that no widespread harms will result from their prosecution.

Given these competing priorities, there is no consensus on whether peace or justice should take precedence, or under what conditions one or the other should prevail. Some, such as Diane Orentlicher, argue that usually there is a duty to prosecute those who transgressed the law (Orentlicher 1991; cf. Orentlicher 2007). A foundational legal tenant, “the rule of law,” holds that everyone should be treated equally under the law. Granting amnesty generally violates that principle, and those that argue against amnesties typically raise a rule of law objection. (May disputes that amnesties must be in tension with the rule of law for equity and other reasons (May 2004: 239-43, see too chapters 11-12).)

But others argue that offering conditional or blanket amnesties or pardons can sometimes be justifiable in order to achieve peace. Amnesties are pretrial decisions to not prosecute, whereas pardons are post-trial decisions not to punish even if a suspect is found guilty. Larry May argues that amnesties to protect peace and human rights can sometimes be justifiable (May 2004: chapter 13). Christopher Wellman suggests that if a state protects human rights, its decisions on whether to instate an amnesty should be respected (Wellman 2008). Jack Snyder and Leslie

Vinjamuri (2003/4: 12-15 and *passim*) argue that retributive justice should not take priority over promoting peace and deterring future human rights violations. I bring democratic theory to bear on these questions facing head on the unavoidable dilemmas these options present (see chapter 5). Now that I have situated my work in broader literatures, I summarize the chapters to come and reply to critics who may think they find inconsistencies in my arguments.

Dissertation Summary

The first chapter of my dissertation serves as the foundation for later chapters by providing a basis for a list of rights. I make a conditional argument grounded in an individual right to democracy to derive a list of human rights. The thesis is that if every adult has the procedural rights to an opportunity to minimally politically influence others and to vote, which I suggest are required of any definition of representative democracy, then a robust, substantive list of rights is required to exercise these rights. These substantive rights can be best understood as “basic democratic rights,” in tribute to and building on Henry Shue’s argument for basic rights (1980 [1996]). A robust list of human rights, I suggest, is essential for, and not in tension with, democracy. To make the argument concrete, I provide several examples of substantive rights that are required to actualize a right to democracy. Finally, by applying this logic to domestic and foreign policy, I argue that policies that guarantee or violate these basic democratic rights can be rightly termed democracy supporting or undermining. This provides a powerful reason for why anyone should, if they claim to be proponents of democracy, promote

individual rights domestically and abroad. Protecting these rights may sometimes require the violation of state sovereignty, which is a subject of the next chapter.

In the second chapter I present a novel account of nonmilitary humanitarian intervention by uniting two central and ostensibly competing strands in the literature on when violating state sovereignty is morally permissible. I define nonmilitary humanitarian intervention as any significant violation of state sovereignty not involving violence or the immediate threat of violence that has at least one humanitarian purpose as a central reason for taking action and where there is substantial evidence of this humanitarian motive in the outcomes of the intervention. The first account, associated with Walzer, holds that the right to collective self-determination, even for states that violate some people's human rights, is morally important enough that it overrides most justifications for intervention. The second account, associated with Walzer's critics such as Beitz and Luban, justifies infringing on state sovereignty under certain circumstances to guarantee human rights and allows more humanitarian interventions than Walzer's account does. I reconcile these two accounts by suggesting that collective self-determination requires that everyone can exercise her procedural rights to democracy, which, in turn, requires a guarantee of substantive individual rights. This provides a qualified justification for humanitarian intervention grounded in substantive individual rights, and, at the same time, in collective self-determination. To make this argument, I draw on aspects of just war theory and the literature on state sovereignty. To be clear, this argument is distinct from, and I need not take a position on, whether democracy can be imposed on a state by a foreign military

force. Nonmilitary humanitarian intervention can be far less costly in human and material expenditures to the intervening state than military humanitarian intervention. For this reason, I argue that many nonmilitary humanitarian interventions are not simply permissible but they are actually morally required, assuming they meet other just war requirements such as proportionality. I then argue that some nonmilitary humanitarian interventions are legal under current international law. By examining the 1990-2003 UNSC imposed sanctions against Iraq, I suggest that nonmilitary humanitarian interventions are not necessarily less costly than wars for the target state. This calls into question the last resort principle of just war theory because the reason for that precept is that war is presumed to be the worst possible policy. This may not always be true. The counterintuitive conclusion is that it is not always preferable to exhaust all nonmilitary options before waging war. But it does not follow that we should therefore have more military or nonmilitary humanitarian interventions; neither may meet the stringent requirements adopted from just war theory. This chapter sets the stage for justifying the ICC to exercise its mandate even if the target individual is a national of a state that has not ratified the Rome Statute. In the chapter that follows I argue that its jurisdiction is even wider than is commonly assumed.

In the third chapter, I argue that the Rome Statute, the foundational document of the International Criminal Court (ICC), significantly broadens the common understanding of “crimes against humanity” to include forms of egregious governance. State and nonstate agents who practice poor governance, specifically crimes of major corruption and gross negligence that result in widespread,

foreseeable, and avoidable human rights violations of certain types, can and should be held internationally criminally liable for both their acts and omissions. I connect this claim to the resource curse by arguing that holding a leader to account through the ICC may be one way to ameliorate the resource curse, while acknowledging the possible negative unintended consequences of this strategy. Finally, I suggest that general deterrence may be more likely for nonviolent international criminals because the motivations of these criminals are generally more instrumental than violent criminals, contingent on the court actively prosecuting such criminals. If the ICC has such wide discretionary powers, how should it use them?

In the fourth chapter, since the ICC can choose when it can investigate and indict alleged international criminals, I consider when and why it should actually do so. Three main arguments for international criminal law (ICL) that can also be seen as guidelines for the ICC include retribution, deterrence, and “expressivism.” Proportionate retribution is impossible for international crimes, unlike for most domestic crimes, since international crimes harm such great numbers people in the worst ways possible. From this it does not follow, however, that retribution should not be a or the goal of the ICC. If it can be supplemented by another argument, we may find a more convincing justification for ICL and the ICC’s strategy. I argue that minimizing violations of human rights should be the primary aim of the ICC, and the best way to reach that goal is by prioritizing deterrence when the prosecutor is deciding which individuals to investigate and indict. The ICC can improve its deterrent effect if the prosecutor focuses on indicting nonviolent as well as subordinate international criminals in addition to his current emphasis on the most

culpable violent offenders. Deterrence will likely only be effective if and when states consistently arrest alleged international criminals. Because the ICC lacks an international police force, the prosecutor and the ICC staff should consult and set policy in conjunction with other actors, especially those related to military and nonmilitary humanitarian interventions, in order to maximize deterrence.

In the fifth and final chapter, I contribute to debates on transitional justice. Transitional justice is a concept consisting of a multitude of potential types of justice enacted between one political regime and another, often between an autocratic violating human rights government and a democratic one that generally respects human rights. This chapter balances three democratic principles, including collective self-determination, the all affected interests principle, and basic democratic rights, to argue that victims and potential victims should constitute the transitional justice *demos* so long as their basic democratic rights are not threatened by participating in a transitional justice vote. I criticize those who have proffered theories of when prosecutions, amnesties, or truth commissions are preferable because their theories are fraught with democratic deficits. Some might make the Lockean objection that my argument would mistakenly allow the people to decide in their own cases, and people are always badly biased in their own cases. This is inaccurate. The *demos* would sometimes be allowed to decide whether an individual should face a criminal trial, but all the normal safeguards that criminal trial should have apply. Indeed, whatever transitional justice avenue they choose, unbiased individuals, not the *demos* or anyone the *demos* chooses, will oversee ensure the proceeding are fair. The *demos*, according to my theory, cannot decide whether or

how to punish. Giving the *demos* some say must be balanced with fairness considerations of giving them no say, or giving perpetrators a say, or giving those unaffected a say. None of the alternatives are preferable. To implement my argument, a new institution should be created. It would consist of a two tiered set of panels that would make decisions such as who is included in the *demos*, what issues should be put to a vote, and so on. This chapter does not attempt to construct a theory to resolve tensions in transitional justice decisions. Conversely, exactly because these tensions are inevitable, I develop a theory of who should be empowered to make transitional justice decisions and how they should be constrained.

It may seem like chapters 4 and 5 are inconsistent because in chapter 4 I argue that the ICC should generally prosecute in order to deter and in chapter 5 I argue that a *demos* should sometimes be allowed to choose transitional justice options other than criminal prosecution. There are a few responses to this. First, because the ICC can exercise its jurisdiction only when states are unwilling or unable to provide justice domestically, in some cases there will be no tension at all. In cases where individuals are accused of crimes against humanity, war crimes, or genocide (and aggression after 2016) and a state fairly tries individuals for these crimes, the ICC cannot exercise its jurisdiction. Moreover, as I discuss in chapter 4, the ICC's prosecutor has leeway to decide when not to try a case when it may be against the "interests of justice" (Rome Statute 1998: Article 53 (1)c). Since the "interests of justice" is not defined, this may justify the ICC not prosecuting some individuals even if they are not tried domestically if a state employs truth

commissions, amnesties, or other transitional justice mechanisms. Nonetheless, there may be some cases where principles are in tension, just as in other areas of morality, for instance when rights conflict.

There is another way to put the objection and another response. Some might see an inconsistency between defending individual rights and then allow peace to be possibly undermined if a *demos* chooses a criminal trial. It would be consistent, someone might argue, only to defend peace and protect human rights at all costs, or at least at very high costs. It is more complicated than this, however. Near term and long term priorities may be in tension. Over the long run, consistently prosecuting and thus deterring potential international criminals may protect the human rights of those we cannot currently identify because we do not know where the next genocide or criminally bad mismanagement of a population may be. In the near term, non-prosecutorial options such as amnesty in exchange for truth from former perpetrators may protect specific identifiable individuals. There thus can be a tension between long term and short term protection of human rights, between short term peace and peace over the long term. A typical way of viewing the peace vs. justice debate ignores the long term consequences of both peace and justice. I know of no way to resolve this conundrum. This is not just a problem with my arguments, but a tension haunting all theories on this subject even if goes unacknowledged. In chapters 4 and 5 I try to fairly balance the rights of future unknown persons with those in immediate risk that appear on the front pages of the world's newspapers. Deterring international criminals through prosecutions at the ICC and sometimes allowing those past victims and potential future victims a say in

policies that directly affect their lives is a fair means to weigh competing claims. Although general deterrence is a goal I argue for and claim that it should normally trump other considerations, it should not be a juggernaut that always defeats all other options. The ICC's prosecutor should consult with both panels of officials who may decide to hold a local referendum, as well as others, to decide what should be done if local actors want some form of local justice. That individuals have to make this short term and long term tradeoff is tragic. Perhaps one day the institutions will exist that will obviate this predicament. But until then, we will have to make hard choices, choices that perhaps will leave those who make the decisions with dirty hands (Walzer 1973). Finally, notice that on my account other actors would continue to have responsibilities to protect human rights, by, for example, military intervention, so that making such tradeoffs would not abandon those at risk. We now turn to chapter 1.

Chapter 1

Basic Democratic Rights: Conditionally Deriving a List of (Human) Rights from A Thin Procedural Conception of Democracy

Introduction

In a democracy “the people,” as J. S. Mill puts it, “...may desire to oppress a part of the number; and precautions are needed against this as against any other abuse of power” (OL, I, §4). This paper offers just such a theoretical precaution through reconciling many individual human rights with democracy by suggesting democratic theory has a generally necessary internal powerful safeguard to protect against many of the worst abuses of human rights. Specifically, I make a conditional argument by contending that if one accepts a single component of a thin proceduralist definition of representative democracy, then a surprisingly robust list of human rights necessarily follows. The right to participate in representative democracy as I use it here is an individual right that only requires both the

opportunity for direct political influence, and indirect political influence through having some minimal opportunity to persuade others in the realm of politics. If either or both of these components are not secure, one does not have a right to democracy. My thesis is that a right to democracy is not just that: it is a right to all sorts of other rights. To secure the two components of the democratic right, a robust and fuller list of human rights than many might imagine is needed. For instance, one must be alive to vote, so some level of subsistence for some reasonable length of life is necessary to exercise one's democratic right. Mill's worry that a *democratic* tyranny of the majority might exist in the sense of violating some vital individual rights is a theoretical impossibility. These claims are the ones I defend here.

Democratic theorists have long been preoccupied with two alarming outcomes both stemming from the possibility that majoritarian choices could produce morally objectionable results (Mill 1859 [1992] Chap. 1, §4; Tocqueville 1835 [1994]: Vol. 1, Chap. XV; Madison 1787 [2003]: Federalist # 10). Note that I write there is a tension between possible objectionable outcomes and majoritarianism, not democracy, because as I argue below democracy is distinct from and places significant restrictions on simple majoritarianism (Beetham 1999: 93). Democracy, though not simple majoritarianism, avoids these problems to a significant degree. The first disturbing outcome is that the rights of some – almost always a minority group – could be violated by a choice of some majority. Take for instance the historically all too accurate case of one majority racial or ethnic group denying fundamental rights, including the right to vote, to a racial or ethnic minority. The second is that the common good, or the “permanent and aggregate interests of

the community,” as Madison puts it, could be subverted (Madison 1787 [2003]: Federalist # 10, p. 41). The argument presented here goes a long way to allaying these concerns. It directly addresses the first objection by suggesting that most human rights violations are nondemocratic, and indirectly addresses a piece of the second by bracketing off one of the most significant components of how the common good can be subverted, namely, by rights violations.

The structure of my argument is conditional, borrowing in modified form but differing in substance from H.L.A. Hart’s 1955 article “Are There Any Natural Rights?” (Hart 1955). There, Hart argues that if there are any special rights, there must be at least one general natural right to moral choice. Conditional arguments are inevitably defenseless against those who do not accept the “if” clause. Here, the antecedent to “then” is “if one accepts a minimal conception of democracy defined by the individual right to democracy.” This leaves my argument vulnerable to nondemocrats and to those democrats who disagree with my portrayal of an essential aspect of democracy on which my argument relies. I admit this paper won’t convince nondemocrats, and those like Joshua Cohen, Richard Arneson, Andrew Altman, and Christopher Wellman who believe there is no such thing as a human right to democracy (Cohen 2006; Arneson 2004; Altman and Wellman 2009: Chapter 2). However, the aspect of democracy that is vital to my argument is I believe necessary though may not be sufficient for representative democracy itself, meaning all democrats must accept my argument.

Additionally, my thesis shares a feature of Henry Shue’s basic rights argument (Shue [1980] 1996). Shue argues that two rights – security and

subsistence – are “basic,” by which he means they are required to exercise all other rights (Shue [1980] 1996: 19 and *passim*). What I mean by basic differs from Shue’s understanding. Shue starts with the question, which rights are required to exercise all other rights? My argument takes a different and narrower starting question, namely, which rights are generally necessary to exercise the rights to democratic participation? Thus most of the rights I defend here are not basic in the sense Shue defends, being required for *all* other rights, but they are required to exercise the individual right to democracy (more on this below).³ The rights I argue for here therefore can be thought of as “basic democratic rights;” if any one of the rights I defend in this paper is violated, one’s right to democracy is not guaranteed.

I neither defend a full conception of democracy nor a full list of human rights. Although a pluralist grounding for human rights would, I think, be the best way to generate a list of human rights that most closely coincides with many people’s intuitions or those listed in the Universal Declaration of Human Rights (UDHR), I avoid this deeply important but difficult project here. My approach takes a different starting point than most foundational accounts of human rights. Others attempt to construct a list of human rights from some criteria such as needs (Shue [1980] 1996), agency (Griffin 2008; O’Neill 1987), interests (Caney 2007), autonomy (Raz 1986), dignity (Perry 1998, Nickel 2007), capabilities (Sen 2005, Nussbaum 1997) or reason (Gerwith 1996). Similarly, I do not rely on a natural rights foundation as Hobbes (1651), Locke (1689) and others do. Natural rights are controversial because it is uncertain where they come from or what lists should be included in a

³ From here on I drop the qualification “generally” to not be repetitive, but it still applies throughout.

list of natural rights (e.g., Betiz 2009: 4-5 and Chapter 3). They appear to be just assertions, or if one applies to other principles then the defense collapses into the previous approach. Yet unlike approaches such as Derrick Darby's (2009), that hold that moral rights only exist if social recognition of such rights is guaranteed at some acceptable level, which does not provide reasons for why some rights should be accepted and others rejected, my approach provides at least one reason for why some morally urgent characteristics that all humans share deserve to be recognized as rights. Finally, my approach is similar to Christiano's in that it uses instrumental reasoning and depends upon democracy (Christiano 2011). But Christiano argues that there is a human right to democracy *because* it is required to guarantee all sorts of other human rights whereas I argue that if there is a right to democracy, all sorts of other rights follow (Christiano 2011) Although democrats disagree with one another on a vast number of issues, everyone that believes in an individual right to democracy should form what Rawls calls an "overlapping consensus" on the substantive rights I defend (Rawls 1971 [1999]: 340, 1993: Lecture IV, 385-95).

Although Rousseau (1762) and others contest the idea that democracy requires some individual rights, the idea that some rights are somehow tied to democracy is not new. Isaiah Berlin, for instance, wrote in the late 1950s "that to offer political rights, or safeguards against intervention by the state, to men who are half-naked, illiterate, underfed and diseased is to mock their condition; they need medical help or education before they can understand, or make use of, an increase in their freedom. What is freedom to those who can't make use of it?" (Berlin 1959 [2002]: 171. Cf. Sen 1999: 152-3, Chapter 7). In the early 1980s, Michael Walzer

wrote that the right to welfare would “guarantee to each citizen the opportunity to exercise his citizenship and that is an opportunity he could hardly be said to have, or to have any meaningful fashion, if he were starving to death or desperately seeking shelter for himself and his family” (Walzer 1981 [2007]: 13). Nearly two decades later in a passage discussing the importance of opposition to the ruling regime for democracy, Ian Shapiro wrote “democratic theorists who value effective opposition have long recognized that unless procedural guarantees are backed up by permissive civil and political freedoms of speech, press, assembly, and organization, they are all too easily rendered meaningless” (Shapiro 1999: 40). Published in the same year as Shapiro’s book, David Beetham argues “human rights constitute an intrinsic part of democracy, because the guarantee of basic freedoms is a necessary condition for people’s voice to be effective in public affairs, and for popular control over government to be secured” (Beetham 1999: 93 and see chapter 5).

Although others have connected rights and democracy, I use a two-pronged procedural individual right to democracy to derive a list of human rights in a novel way. I agree with Beetham’s conclusion, but I get there via a different route than he does. In addition to the right to political participation through voting, I concur with Beetham that there is a right to politically influence others, but unlike Beetham and others, I believe this right is only to a minimal opportunity to politically influence others resulting in vastly *unequal* political influence that is, nonetheless, still minimally democratic (see Buchanan 2004: 251). Though this definition of democracy is closer to contemporary Western democratic practices than it is to many ideals of democracy, I demonstrate that an unexpectedly robust list of rights is

required to exercise these individual rights to democratic participation. Finally, I argue that basic democratic rights are not merely relative to membership in one's polity, but rather have global implications. For instance, if a polity respects human rights internally but violates them externally, my argument provides a reason why, contrary to much popular opinion, the polity would only be partially democratic.

I make these arguments in the following order. I first define the minimal necessary aspect of democracy that I use in my paper through criticizing some leading democratic theories. Second I discuss what I mean by minimal opportunity to exercise political power and political influence. Third, I briefly discuss what I mean by a human right, and discuss whether guaranteeing the level of a right should be relative to a society or should be universal, and why. Fourth, I provide a number of examples of which rights are required to guarantee the right to democracy. Fifth, I show how foreign and domestic policies that promote or infringe on human rights are respectively democracy promoting or undermining. Finally, I anticipate some objections and then conclude.

A Minimal Pure Procedural Necessary Component of Democracy

Below I develop a procedural definition of democracy in some detail, but I first say a few things about my more general conception of democracy. By democracy I mean electoral representative democracy, not direct democracy, even though some of the substantive rights I argue for are required for direct democracy as well. A wide range of contemporary types of representative democracy is consistent with my argument: parliamentary or presidential, first past the post or

proportional representation voting systems, a small or large *demos*, and so on (Held 2006; Pitkin 1967). I assume popular sovereignty, the idea that ultimate political authority resides in the citizens who compose a polity (Locke 1689: II, §149; Goodhart 2005: Chapter 3). I need not and do not take a position on the size of or who should constitute any particular *demos* for the purposes of this chapter. I also accept that generally majoritarian decision-making is appropriate for most circumstances in a democracy (Beetham 1999: 18-26), but that in some cases super-majoritarian voting systems may be preferable (Shapiro 1999: 31-9) and in rare cases even unelected offices may be critical to a democratic system, such as with the US Supreme Court.

Often democratic theories are divided into substantive and procedural categories. It is common to mix these together, such as liberal democrats do. Pure procedural majoritarian accounts of democracy can degenerate by violating fundamental individual rights or becoming nondemocratic in other ways. As critics of Rousseau's direct and absolute democracy have long noted, a majority of the population could vote, say, to disenfranchise a quarter of the population, and the unlucky quarter would have no democratic recourse (see Brettschneider 2007: 13). Arbitrarily depriving a group of people of their democratic right is rightly widely understood as being antidemocratic.

Corey Brettschneider notes that some have responded to this challenge by suggesting to institutionalize a single "procedural right of all to participate" plus majoritarianism (Brettschneider 2007: 13). Brettschneider's objection to this account is that it would in no way guarantee a sufficient level of education or

information to permit meaningful participation in the democratic process (Brettschneider 2007: 13). Mistakenly, however, he equates and thereby constrains participation to voting (Ibid.). To be sure, voting is an essential feature of political participation, but the underlying and more fundamental concept that voting embodies is a right to the opportunity to exercise political power, as I argue below. The idea that meaningful participation requires other rights is central to my argument and the next approach that Brettschneider identifies.

To take account of the objections Brettschneider notes, he then presents but rejects a third account of proceduralist democracy, what he calls “rights as procedural preconditions’ to democracy” (Brettschneider 2007: 13-4). By noting the problems with the second approach of only guaranteeing the single right to political participation, supporters of this third option seek to remedy those objections by guaranteeing a larger set of rights, which they claim as procedural as they are only meant to guarantee democratic participation of citizens as moral equals (Brettschneider 2007: 13). I challenge Brettschneider’s first criticism, that “an empirical study could show that participation was causally unaffected by the preconditional rights” these theorists have posited with the theoretical arguments I make below (Brettschneider 2007: 14). I do so by demonstrating that the rights I argue for are not merely empirically but actually theoretically required to exercise the democratic right. His second criticism, that “those participating in the procedure could decide to revoke the preconditional rights,” misunderstands the nature of these rights (Brettschneider 2007: 15). These rights are not open to majoritarian, supermajoritarian, or even unanimous alterations because they are necessary for

the democratic right. An ostensible paradox that arises from this, that democracy relies on a non-majoritarian footing, dissolves when we recall that democracy does not equal simple majoritarianism. It may very well be true that democracy relies on non-majoritarian grounds, but this need not be a paradox for democratic theory. It does not follow, however, that the procedural preconditional rights cannot be forfeited. For example, criminal actions could perhaps justify forfeiting or overriding some of the rights I argue for below. Though I do not need to take a position on the inalienability of these rights for the purposes of this paper, the point I wish to emphasize is simply that any sort of majoritarian choice is not a sufficient justification for revoking the preconditional rights, contra Brettschneider's objection. I turn now to which rights, at a minimum, each individual must possess to have secure the right to democracy.

Minimal Individual Democratic Rights

In this section, I argue that democracy can function with unequal political influence, contra some of the leading thinkers. Before I develop this argument, I clarify a few key terms. I define power as Dahl does: "*A* has power over *B* to the extent that he can get *B* to do something that *B* would not otherwise do," and *A* can sanction *B* if *B* does not comply (Dahl 1957: quote from 202-3, see too 204). Influence is a less coercive and more egalitarian concept. I take influence to mean the ability for one person to persuade another. Persuasion is a freer choice than power entails. If *B* refuses to be influenced by *A*, she is no worse off for it, or at least she is no worse off because of *B*. Someone's boss has a limited amount of power

over a subordinate because if the employee does not comply with the boss's wishes, he may be fired. But the boss's power is limited because she can't legally ask the subordinate to do anything at all. Someone may try to influence her friend that the 2003 American-led war in Iraq was wrong, but if she fails, she has no recourse to punish the war's defender. It is up to the friend to decide whether she is persuaded. In a democracy, influence is connected to power in a number of ways. One primary way that influence is translated into power is through the political process – and this is one reason why the opportunity to influence others is crucial to democracy. Because voters are persuaded through the media, political speeches, friends, family, religious leaders, and so on, to choose one set of politicians over another, those politicians in turn make laws which are one potent form of political power. I turn now to the arguments about what degree of equality or inequality is required to exercise democracy.

Thomas Pogge and Robert Goodin, among others, claim that equal or at least roughly equal political influence or power is one necessary democratic right. Pogge, for instance, claims that a necessary but not sufficient feature of democracy is that every citizen should possess “roughly equal political influence” (Pogge 2008: 152). Goodin concurs, claiming “equal political power is arguably the cornerstone of democracy” (Goodin 2007: 50). Beetham is vaguer, but he claims that individuals should have a right to a say in public affairs through government and through civil society, and “that this entitlement should be available on terms of equality to all” (Beetham 1999: 91). He believes that “the ordinary person is as entitled to an *effective* voice in public affairs as . . . the especially gifted or intelligent” (Beetham

1999: 6, my emphasis). This is “central to democracy” (Ibid.). But this cannot be correct.

As plausible as the roughly equal nature of political influence sounds, and as widespread a notion as it is among democratic theorists, Pogge, Goodin, Beetham, and others are mistaken not in their emphasis on political influence and power, but in their claim that democracy must guarantee everyone equal or roughly equal shares of them (Walzer 1983: 304). This is so for at least two *democratic* reasons. First, the most common form of contemporary democracy, representative democracy, not only allows but also requires vastly unequal political influence and power. From the local city council member to the president of a country, we normally believe that elected representatives are legitimate, and should, in fact, have more political power than unelected citizens. Even direct democracy, such as was practiced in ancient Greece and which Rousseau countenances, requires unequal political power since someone or some group would presumably have to decide on who constitutes the *demos*, set the agenda, voting procedures, and so forth, through which some would exercise greater political power than others, even if the Greeks often mitigated persistent inequalities of citizens through sortition (Held 2006: 17-19).

Second, even if we assume that Goodin, Pogge, and Beetham meant to constrain their claim to nonelected citizens, this would still be objectionable to most representative democrats on democratic grounds since numerous nonelected citizens do and should have the opportunity to exercise far more political influence than others. A vibrant, investigative, and critical press is just as important as local

and national political organizers and leaders are to democracy. According to Pogge's "roughly" equal political influence account, newspaper columnists, television reporters, radio talk show hosts, political organizers, and even many religious or community leaders would not be able to practice their vocations because they wield far more political influence than the average citizen. The same goes for Beetham's requirement that an average citizen have just as "effective [a] voice" as "the especially gifted or intelligent," which would presumably include unusually gifted newspaper writers, and TV and radio talk show hosts. Not only are these unequal influences widely accepted, but it is common to view them as nurturing for democracy.

These examples might push us toward a principle of *equal opportunity* for unequal elected and nonelected political influence instead of claiming that democracy requires equal political influence, and perhaps this is something like what Beetham means by "available on terms of equality to all" (Beetham 1999: 91). The argument might go something like this. Assuming that individuals are morally equal, and contemporary democracy generally requires at least the two ways of unequal political influence mentioned above – voting for representatives and some chance at politically influencing others – then *because* people are morally equal, everyone deserves roughly equal opportunity to politically influence others. But how, practically, this egalitarian goal of equal or roughly equal opportunity of political influence could be reached in any modern society remains hard to imagine. Now, many aspects of one sphere of life can translate into political influence, from one's family name, to one's income, to one's education (Walzer 1983). However

unfair these disparities in opportunities for political influence and power are, abolishing or even significantly reducing them is difficult if not outright quixotic. Instead of starting from this perhaps justifiable egalitarian ideal, I argue for a weaker claim that is more easily implementable and closer to contemporary reality in Western democracies, that everyone deserves a right to some *minimal level* of opportunity to politically influence others. My point is not that this minimal opportunity to politically influence others is the most democratic option available, far from it. Rather, my point is that this minimal opportunity is necessary for democracy, and, second that even with this minimal starting point, a robust list of rights follows.

Before reaching, and as a route to, that claim, we should examine political influence and power in more detail. Specifically, three distinct questions arise from this discussion.

1. What should the minimal level of opportunity to exercise political influence be for every citizen in order to qualify as a democracy?
2. How should the opportunity for unequal political influence be allocated in a democracy?
3. What should the limits of individual and collective political power in a democracy be? (Beetham 1999: 93-4)

I focus on questions (1.) and (2.), although the answer of (1.) obviously affects the answer to question 3. For instance, if everyone deserves, at a minimum, the right to vote (1.), then the limits of collective power (3.) would be set in at least this one way.

The right to vote is a necessary but not sufficient component of this minimal opportunity of political influence (Dahl 1989: 109-11). While a “minimal level of opportunity to exercise political power” is admittedly vague, I cannot immediately say more about what this entails. The rest of the paper, however, constructs an argument for what this minimum political power requires through democracy’s concomitant necessary rights.

I want to emphasize that minimal political power and minimal opportunity at politically influencing others are merely two aspects of democracy, and that many rightly believe democracy is a much fuller concept. This paper does not attempt to fully define democracy. Rather, I start from this minimal conception of democracy because even from this thin grounding, a surprisingly robust list of rights follows, and because it will invite an overlapping consensus that otherwise would be harder to attract.

What I call a “minimal procedural individual democratic right” or “democratic right” for short is a two part claim that everyone deserves a right to

1. Some minimal opportunity to exercise political power that at least requires the opportunity for all adults to vote.
2. Some minimal opportunity to politically influence others (see Beetham 1999: 91).

This is the basic definition of one aspect of democracy, that of participation, that I will use throughout the paper. Unless otherwise specified I assume that the decision procedure is simple majoritarianism, meaning any number of votes over 50% wins. Far more must be said by where these “minimal” lines are drawn, and why.

Minimal Justifiable Levels of Political Power and Influence?

First, notice that 1. and 2. are intertwined: political power includes aspects of influencing others. Although the two are closely connected, I mostly address the second, the minimal opportunity to politically influence others. Of course not all aspects of influencing others would be political, or they would be political in a sense outside of the typically accepted arena. For instance, having a friend offer to buy you dinner if you play on his soccer team is a form of influence, but outside the realm of politics traditionally understood and outside of what I consider political here.

The question of what these minimums should be can be tackled in a number of ways. Robert Dahl, although addressing a different question, implicitly provides an answer to the question whether an individual's right to vote is sufficient for minimal democratic political power (Dahl 1999). He asks how many people a polity can maximally include to still, in some sense, be democratic. Rousseau famously argued that only small polities (along with a number of other conditions) could truly be democratic. Dahl, in a chapter about the possibility of global democracy takes up the outer limits to Rousseau's concern, contending that even if some sort of global electoral institution were realizable, the diminished power that each person in a world with more than 6.5 billion inhabitants would wield would drop below the minimal necessary for a democracy. By rejecting the possibility of a global *demos*, Dahl rejects that the right to vote could be the minimum political power necessary for a polity to be considered democratic. I accept as uncontroversial and therefore

make no argument for why the right to vote is a necessary component of democracy. But if voting is not sufficient, what else is required?

Whereas Dahl takes his argument to be one against a global *demos*, I instead take his argument to be one against taking voting as a sufficient condition for democracy in a large polity. Opportunities to politically influence others are required for everyone in a large polity to qualify as democratic. Perhaps having these other opportunities besides voting to exercise political power, however, still would not reach the minimal limit to qualify as a global democracy, but I need not take a position on that here.

Another tack focuses less on questions 1. and 2. above, what the minimal level of political influence one should have and how opportunities for unequal political influence should be distributed to qualify as a democracy, and more on question 3., what the legitimate limits are of collective democratic power (Beetham 1999: 93-4). Ian Shapiro, for instance, identifies democracy with the avoidance of domination of the individual, among other things (Shapiro 2003). “The challenge for democratic theorists,” Shapiro writes, “is to devise mechanisms for structuring the power dimensions of human interaction so as to minimize domination...” (Shapiro 2003: 39). Dominance, for Shapiro, is the “illegitimate exercise of power” (Shapiro 2003: 4). As J.S. Mill (1859) famously argues, and which Shapiro tacitly countenances, governments are far from the only actors that can dominate (Shapiro 1999: 31-2). These points are important because, by setting the outer limits of justifiable political influence over others, it at the same time permits a space of legitimate political influence.

Combining Dahl's (1999) argument that more than voting is required to be minimally democratic at least in large polities, with Shapiro's and Mill's points that some space should be free from domination, opens an area for legitimate opportunities to politically influence others. By thinking through democratically illegitimate ways to exercise political influence, we can reach closer to what should qualify as permissible and impermissible political influence. Here I provide just a sketch because given space restrictions I cannot develop such a theory in detail. In a democracy not all manners of influence should be convertible to political influence or power. To exercise legitimate influence over others, Walzer suggests, citizens can use "nothing but their arguments. All non-political goods have to be deposited outside: weapons, wallets, titles and degrees" (Walzer 1983: 304). I would expand what is legitimate somewhat to include reasons, arguments, evidence, religious beliefs, moral doctrines, personal experiences, and other types of information or argumentation. These are the only legitimate means because democracy at its core is grounded in choices and these goods are the only relevant factors for making public choices. Using wealth to influence others as is so prevalent in the US is to some degree illegitimate as well because it is not something innate or available to all. Walzer writes that "when money carries with it the control not of things only but of people, too, it ceases to be a private resource" (Walzer 1983: 121). These examples at least provide a rough guide for what should be permissible and impermissible instruments of political influence.

One might object that everyone is endowed with unequal natural talents that can play a role in influencing others such as intelligence, speaking and writing

ability, charisma, physical attractiveness, and more. So long as the political system allows everyone a minimal opportunity to influence others, it is not clear that constraining natural talents is required on democratic grounds (although natural talents might play a role in justice as Rawls's argues in his theory of justice (Rawls 1971)). Another way to view this is that the right to democracy demands what Isaiah Berlin calls positive liberty including for those who have less natural abilities. Berlin distinguishes negative liberty from positive liberty. Negative liberty is the freedom from interference from other humans whereas positive liberty is negative liberty plus the actual means and ability to perform a task or accomplish some goal (Berlin 1959 [2002]). Negative liberty is not adequate because it disallows for the substantive exercise of the democratic right. But the degree of positive liberty required for democracy is limited since the right to democracy I argue for here is minimal.

Now that we have a better idea of the goods that can and cannot be legitimately exercised as minimal political power, we can summarize the justifications for the right to democracy. Drawing on Dahl, the right to vote is necessary but not sufficient for minimal individual democratic power. In addition to a right to vote, individuals must have some space where they are free from government and nongovernmental domination in which they can engage with others through resources available to all such as argument, rhetoric, knowledge, etc., and can disperse these through the press, speech, books, and so forth. But, at the same time, individuals cannot legitimately utilize all resources possible to influence others. The opportunity to both cast a vote and have the chance to influence fellow

citizens in these legitimate ways thus is the bare minimum of political power and influence that every citizen must possess in a polity for it to qualify as democratic.

I now move on to briefly defining a human right, and then provide the substantive rights that I think are necessary to exercise the democratic right. To make concrete what I mean by these rights, I additionally discuss to what degree they must be enjoyed for these rights to be meaningfully guaranteed.

Defining Human Rights

I use the orthodox Hohfeldian definition of a right, which holds that rights are legitimate entitlements that individuals possess and which can take the form of claims, powers, immunities, or privileges (Hohfeld 1919). Generally, by rights I mean claim rights as Feinberg understands the term, namely that individuals must be able to claim from others the substance of the right in question and do not rely on others' generosity to grant others the substance of the right (Feinberg 1970). Claim rights require some degree of specificity of duty bearers, though I mostly concentrate here on rights and not duties. *Human* rights I assume apply to all adult homo sapiens, and are those rights that it is especially morally urgent to protect. The most widely accepted as well as contested list of human rights is the UDHR. Guaranteeing a human right, Pogge suggests, entails ensuring "that persons are, and feel, secure in regard to the objects of their human right" (Pogge 2008: 68). Most rights can never be 100% guaranteed for all, or else the level of the right would be so minimal as to be meaningless (Pogge 2008: 44). What is required then, to assess if rights are guaranteed, is some independent standard or gauge. Reasonable people

can and will disagree about this limit, but we must have at least some rough guideline.

Shue offers one guideline by proposing that to have a right means that it must be socially guaranteed at some “reasonable level” against standard threats (Shue [1980] 1996: 17, 32-4). This definition just shifts the burden back one step, onto what a “reasonable level” is. A point made by Amartya Sen and Ian Shapiro is helpful here. Sen and Shapiro note that many people can agree on alternatives that would decrease injustice without agreeing on the ideal of a perfectly just society (Sen 2009: xii, 21, 26, 104; Shapiro 1999: 19). Similarly, we can have broad if not universal agreement on when a right is *not* guaranteed, even if everyone cannot agree on the precise societal level of protection a right requires to be guaranteed. Without taking a position on exactly when a right is guaranteed, I instead claim only that many rights across the world fall below a reasonable level of guarantee. Shue makes similar claims when he writes that if infant mortality is 60 of 1000 live births, or if life expectancy is a mere 35 years at birth, then a right to subsistence has not been guaranteed (Shue [1980] 1996: 17, 23 respectively). I assume this is an uncontroversial claim. But this raises another question: what level of guarantee of a right is required, and should it be the same for everyone everywhere?

Relative or Universal Human Rights Levels of Guarantees?

Vague is the substance of many human rights. What does it mean, precisely, to have a right to education, a fair trial, adequate housing, and so on? The human rights literature is saturated with a “cultural relativism” debate that questions

whether human rights should be universal or whether certain cultures, if a certain percentage of members objects to certain human rights, should have the right to exempt themselves from certain or all human rights. Less discussed though just as important is whether there should be a universal or relative level of guarantee for a human right. To illustrate, if everyone has a right to adequate housing (UDHR 25), should that standard be measured against other housing in one's immediate surroundings, one's country, or by a global standard?

To answer the question of what level a right to these goods must be guaranteed in order to enjoy the substance of a right, is a controversial, complicated issue. This is highlighted by the vastly different life expectancies of different individuals across the globe. For instance, the average Zambian in 2008 could only expect to live 46 years, while the average American could expect to live about 70% longer, to 78, raising the question whether there can be any universal standard of when a right is sufficiently guaranteed (World Bank 2008). What most accurately describes these types of cases is that an individual's rights to adequate health care are violated, though not necessarily by his or her country's government. To draw on Rawls's distinction of "burdened" (unable) or "outlaw" (unwilling) societies, many states today are simply too poor to guarantee human rights to a minimal level (Rawls 1999).

Adam Smith's discussion of how to determine what a "necessity" is, is helpful here:

By necessities I understand not only the commodities which are indispensably necessary for the support of life, but what ever the customs of

the country renders it indecent for creditable people, even the lowest order to be without. A linen shirt, for example, is, strictly speaking, not a necessity of life. The Greeks and Romans lived, I suppose, very comfortably though they had no linen. But in the present times, through the greater part of Europe, a creditable day laborer, would be ashamed to appear in public without a linen shirt, the want of which would be supposed to denote that disgraceful degree of poverty which, it is presumed, nobody can well fall into without extreme bad conduct. Custom, in the same manner, has rendered leather shoes a necessary of life in England. The poorest creditable person of either sex would be ashamed to appear in public without them. (Smith 1776: Vol. 2, Book 5, Chapter 2)

I want to draw attention to two of Smith's points. First, if one has a right to adequate clothing, what matters for Smith is clothing relative to one's culture, and, second, what the standard minimal acceptable clothing is, is measured by social acceptance, not mere biological need. Rights, such as this, should be able to vary in allocation of materials and level of minimal adequate guarantee from culture to culture, for what matters in the clothing example for a democratic right is to feel comfortable appearing in public so that one can, say, politically influence others, vote, or hold a job.

Other rights, however, cannot vary in degree of guarantee across cultures because a standard is necessary to exercise the democratic right. Most, though not all, rights fall into this category. Security and subsistence are such rights. Whether it is acceptable for 1% of the population to be assaulted in any given year, should not

depend on whether you reside in Cameroon or Canada or Cambodia. Nutrition in the same way should be included in this category. A Kenyan needs to be well nourished just as much as a Korean does. A right, nonetheless, is defined in a way to allow for individual variation based on need. Sen's and Nussbaum's capability approach, which highlights that some individuals need more calories in a day than others do, is covered by a right to the amount of food required for "a standard of living adequate for the health and well-being of himself..." (Sen 1980, 1999, 2005, Nussbaum 1995, 2000, 2006; quote from UDHR 25). The minimal level of goods or services required to guarantee a right can vary from individual to individual even while the right is secured at the same level globally.

In sum, varying degrees of guarantees should be permitted where the right to democracy is not directly or indirectly threatened. Those rights that are universally required for the right to democracy – such as those discussed below that help maintain an adequate standard and length of life – cannot vary from culture to culture or else the right to democracy is violated. Notice that this still allows for wide policy differences among countries. Take property rights, for instance. Some countries could set highly progressive tax schemes while others could implement a flat tax – so long as doing either would not empirically violate the democratic right directly or indirectly. Thus my argument allows for significantly different, but limited, collective choices.

I turn now to defending certain human rights as necessary components of the human right to democracy that I make a case for above. The arguments below are conditional, assuming the form that if X, then Y, where X is a right to democracy, and

Y is any of various rights, such as the right to subsistence (see Beetham 1999: 96-103). Additionally, some of the arguments are second order conditionals or instrumental arguments; in other words, rights that are required to exercise other rights, which are, in turn required for the right to democracy (Ibid.). The structure of those arguments assumes the form of if X, then Y, but to have Y requires Z. An example of this latter argument is that to effectively claim one's right to vote (Y), one must have some minimal level of education (Z), so Z is also required to ensure the right to democracy (X). This is not a transitive argument, i.e., the order of the placement of X, Y, and Z, in both the conditional and second order conditional, matters. From a right to education, a right to democracy does not follow.

The multitude of first and second order conditional arguments are repetitive and may seem needlessly so. But I walk the reader through a number of them because it is a vital part of my thesis, and they deserve some careful attention to see whether the substance of my argument holds. Each can be viewed as a test of my main claim, that the enjoyment of the substance of these rights is required to have a right to democracy. I draw primarily on the rights enumerated in the UDHR since this is the most widely accepted, as well as disputed, list available. I evidently side with the UDHR's defendants here, although I do so from a fresh perspective.

Democratic Power and Rights that Help Maintain Life (UDHR 3 and 25)

Perhaps the most intrinsically valuable and instrumentally vital category of rights is that which protects biological survival. Here I will only make claims about their instrumental importance. For our purposes of determining which rights are

necessary for democratic participation it may seem too obvious to mention that exercising minimal political influence requires being alive, but this assumption is specious. A wide range of deceased figures, from Jesus to Mohammad, to Marx to Mill, to late cultural icons and politicians, still exercise great political influence from their graves. Some might argue that even being put to death, such as Jesus and Socrates were, bolsters one's political influence. These points notwithstanding, I concentrate on political influence of the living.

Although political influence does not require being alive, voting, at least in the form commonly accepted and practiced, does. Which rights, then, are necessary to live? Before we address this question, we must briefly discuss the question of what a right to life entails. I say briefly because I cannot adequately discuss here what a right to life would fully involve, such as who would be responsible for negative and positive duties, what would be reasonable costs to bear to guarantee a right to life, where the cut off would reasonably be for a right to life, and so on.

Strictly, a right to life is impossible – Keynes is right that in the long run we are all dead – so proponents of a right often make the weaker claim that such a right means to not have one's life unjustly taken (see O'Neill 2005: 428-9 for a similar argument). Instead of focusing on a conceptually and morally uncertain purported right to life, I turn to rights that can reasonably be expected to be components of minimal or adequate standard quality and length of life for most people. The place to start is Shue's classic and convincing argument that there are at least two basic rights, security and subsistence (Shue [1980] 1996, see also Beitz and Goodin, et. al 2009). In *Basic Rights* Shue cogently argues that rights of subsistence and security

are necessary to exercise all other rights. Here, the degree to which a right is guaranteed or violated is vital to assessing Shue's argument (an issue which I take up below). Shue is clearly correct, at least in the extreme cases where rights violations cause death, for from the grave we cannot exercise human rights. Death from violations of the right to individual security or the right to subsistence – or indeed any other reason – of course prevents the enjoyment the right to democracy as well. Thus at least in these extreme cases, rights that guarantee life are necessary for the right to democracy.

The same is true for other rights, such as a right to some level of health care. Without some access to health care, although some lucky few will presumably never need a doctor's services, the vast majority of people will fall below an adequate health standard or may die if they lack medical treatment. Often overlooked, some level of sanitation, and here is the second order conditional argument, is similarly required for adequate health (George 2008). Numerous other goods would fall into this same instrumental category, such as potable water, some level of a clean environment, housing, clothing, and so forth. Without some degree of property rights, many of these rights would be threatened.

Property Rights (UDHR 17)

Arbitrary deprivation of property rights can both directly and indirectly affect the democratic right, though not all property rights violations have this characteristic. Direct violations that might impede the right to vote include stealing a rural person's car, which she needs for transportation to the polling booth.

Stealing something more minor, such as a sandwich she packed for lunch, would not have the same effect and would thus not be covered under the argument from the democratic right. Stealing a sandwich from a malnourished child who needs the calories in order to concentrate in school, conversely, would be protected under a democratic right. As these examples illustrate, property rights must be protected to the extent required to exercise a minimal opportunity to politically influence others or for minimal political power. I cannot address exactly where this line should be drawn here because it would require another theory in itself. Rather, I want to emphasize that some degree of property rights protection is necessary in order to exercise one's democratic right.

Due Process Rights (UDHR 6-11)

Being arbitrarily arrested, jailed, and punished impinges in two ways on the right to democracy. These rights violations may not necessarily impinge on the right to vote, for many societies allow prisoners to still exercise this right. Arbitrary detention often, though not always, violates the right to a minimal level of opportunity to politically influence others indirectly by preventing the arrested from politically organizing, or speaking. Worse, jail in some countries carries a high risk of being infected with an often fatal disease such as multi-drug resistant tuberculosis in the US and Russia or HIV in some Sub-Saharan African countries (Farmer 2005: Chapters 4 and 7). As I argued above, death because of arbitrary detention clearly violates one's democratic right. (US judges have ruled that the failure to screen for and treat serious diseases of inmates constitutes cruel and

unusual punishment thereby violating one's constitutional rights (Farmer 2005: 194).)

This need not always be the case to have one's rights infringed upon. Nelson Mandela, for example, who was incarcerated for over a quarter century exercised enormous political influence from his jail cell. Despite his political influence, his basic democratic *rights* were still violated even though he was able to politically influence others from jail. Just because a select few are able to influence others from behind barbed wires and bolted cells, does not mean a right is guaranteed (See Shue [1980] 1996: Chapter 3, esp. 78-82; Altman and Wellman 2009: 32-3). As Shue puts it, "even in the absence of a right to freedom of physical movement, people can enjoy the substance of many rights. But they cannot enjoy them as rights, only as privileges, discretions, and indulgences" (Shue [1980] 1996: 81). That a select few are able to politically influence others even while their basic democratic rights are violated does not undermine my argument that the rights I argue for here are democratically basic because being permitted to exercise the substance of a right is different than having the right. As Feinberg would put it, having a right requires being able to claim it (Feinberg 1970). It is important to make a distinction here between public *esteem* and public *influence*. Mandela could have been incarcerated and the public could have continued to regard him highly. But had his jailors decided to not allow him any contact with South African society, he would not have been able to influence people directly. Only through people imagining what Mandela would want and what Mandela would have done had he not be jailed could he affect people's political choices. The credible threat of arbitrary detention makes insecure

the rights to association and freedom of movement, which are necessary to guarantee minimal opportunity of political influence. The same is true of threats of arbitrary arrest for public speaking and writing.

Freedom of Movement and Asylum (UDHR 13-15)

The freedom to move is both directly necessary and almost always instrumentally required to guarantee the rights to democracy. Directly, it is necessary to exercise the minimal opportunity to politically influence others through organizing or public speaking. Imagine a candidate running for office, but constrained to house arrest or prevented from traveling a country's roads. Her chances of electoral victory would be significantly reduced – indeed to the point of violating her right – even if some extraordinary individuals still despite the odds manage to win office. Instrumentally, it is required to exercise or enjoy other rights such as buying food, attending school, holding a job, or visiting a physician.

Rights to asylum are equally required. Instrumentally they are required to ensure the right to life or security. For reasons of sexual orientation, gender, political views, ethnicity, religion, race, and so on, individuals are persecuted daily. Without a right to asylum, many would be put to death unjustly and many more would be harmed in ways that would violate one's right to democracy.

The Right to Education (UDHR 26)

I assume here that the hypothetical person in question has an average level of natural intelligence. Some level of education is necessary in order to exercise the

right to vote. The level of education for this is likely minimal, perhaps limited to some ability to reason and weigh options. Perhaps an elementary level of education would be sufficient for these skills. The right to education is mostly justified by the other aspect of a democratic right.

To have a minimal opportunity to politically influence others, a higher level of education is required. Making cogent arguments, criticizing those in power, knowing basic facts about a wide range of subjects so that one can assess politicians' and others' claims, writing clearly and speaking convincingly all may require some higher level, such as secondary or perhaps even tertiary education. Much depends on the quality of the schooling, which varies vastly from school to school, let alone country to country. Perhaps some students can achieve such skills after secondary school while others would require a university education. This may seem like too high of a bar to set as a "minimal opportunity to politically influence others," but without these skills, it would be next to impossible to politically influence others by legitimate means (Nussbaum 1998).

Education is additionally essential to understand and claim one's other rights. As Michael Goodhart puts it, "without an adequate education it is difficult to understand one's rights and to navigate the system of social and legal institutions available to protect and promote them" (Goodhart 2007: 101). Similarly, Beetham argues that education is "necessary to [ensure] the attainment of other economic rights" (Beetham 1999: 97). Even if the claim that education is necessary for other economic rights is too strong, Beetham is right to say education is the "surest means to a basic income and to other economic rights" (Ibid.). The point here is that

education is directly necessary to adequately exercise the right to politically influence others, and indirectly claim one's rights and probably the surest way in a free market economy to guarantee other rights through employment.

Rights to Speech, Conscience, Assembly (UDHR 18-20)

The competency education provides for politically influencing others would be for naught if the rights to speech, conscience, assembly, and press were violated. If only some individuals, for example government officials and government news sources, were granted the right to speak, the government breaches others' democratic right. By threatening or arresting journalists, political opposition leaders, writers or artists, the government prevents the minimal opportunity to politically influence others.

Rights to Nondiscrimination (UDHR 2 and 7)

Because the right to democracy is minimal, some might think that the right to democracy would not adequately guarantee non-discrimination rights. Allen Buchanan criticizes Rawls's thin list of human rights on similar grounds because, Buchanan argues, Rawls allows for objectionable prejudice and oppression including systematic discrimination based on gender or caste (Buchanan 2004: 160-1). The right to democracy would require legal prohibition of many forms of discrimination. Most obviously, it would prohibit selective application of the legal rights that I discuss above based on race, gender, age, sexual orientation, religion, caste, ethnicity, and so on because exercising these rights are necessary for

everyone to exercise the right to democracy. Indirectly, it would preclude employers from discriminating based on such characteristics because employment is a means to exercising one's right to minimal political influence. The same reasoning would prohibit educational discrimination. Hence the right to democracy would prohibit slavery, Jim Crow, the caste system, apartheid and all similar discriminatory regimes. Admittedly, the right to democracy may not guarantee the full range of nondiscrimination rights that we might think justice demands. Nonetheless, it prohibits some of the most egregious forms of discrimination and does nothing to prevent societies from passing stricter anti-discrimination laws.

Objections

In this section I consider three objections. First, I consider the objection that my account unfairly privileges first generation, or political, rights. Second, I consider the charge that the rights that can be derived from a right to democracy are either too vague or too thin. I spend the most time on the third objection that contends that the scope of the chapter is limited to only states that are democratic to some degree.

Carol Gould criticizes Beetham's 1999 account that privileges democratic rights by claiming that Beetham "tacitly endorses the problematic liberal preference for political and civil rights" which "renders the crucial right to means of subsistence subordinate to these others" (Gould 2004: 194). This objection might also be brought against my argument. But nowhere do I claim that the right to democracy is more morally important than security or subsistence – indeed I believe most would choose life and security over democracy, if presented with the choice in those terms.

Far from privileging the democratic right, my account actually shows why other rights must be guaranteed in order to exercise the democratic right. Gould's concern is undercut by the argument of this chapter because it shows that other rights must be guaranteed for the right to democracy to be exercised.

A different objection asks whether the level to which a right must be guaranteed by the derivation from the right to democracy would either be too vague, or too low for many to accept from, say, Rawls's influential reflective equilibrium approach to political theory. A right to something says something but not everything about the level to which it must be guaranteed for the right to be realized. For some rights this is less of a problem than for others. For instance, it is fairly obvious when the right to physical security is violated. It is less clear when an adequate or minimal right to health care, housing, education, or subsistence has been fulfilled. But I have tried to address the vagueness and the level of guarantee objections above. I do admit that perhaps a right to democracy does not guarantee rights to the full extent that we would like, but I leave open the possibility for a plural grounding of human rights, which could both increase the list of human rights in number and the degree of their guarantee. I purposely begin from a minimal starting point to attract the widest consensus possible.

This next objection is one of scope rather than in reference to the chapter's thesis. The concern is that a polity's external rights violations, e.g. as through unjust foreign wars, supporting exploitative polices and institutions, and propping up autocratic regimes, are not covered by this theory. It assumes a polity's extant boundaries, and assumes that only those internal to it possess the democratic right.

Foreign policy, nevertheless, is covered by this theory because foreign rights violations are antidemocratic in reference to the foreign country's government, even if that government is not, now, democratic. Certain human rights infringements are always antidemocratic, but what changes is in reference to whom or to what the rights violations is antidemocratic. Violating the rights of foreigners is antidemocratic for the same reasons violating the rights I argued for in this chapter domestically is antidemocratic, but it is antidemocratic in reference to the foreign country, not with respect to the rights violating country.

Even many countries that are now internally democratic are antidemocratic in much of their foreign policy by directly violating foreigners' rights, or indirectly through failing to provide adequate access to many of the rights argued for here, such as health care, sanitation, or education. Ensuring a democratic right therefore may extend beyond a country's borders, and constraints may be required on international actors.

At first the observation that rights can be threatened by international actors may not seem to matter for the minimal level of political power necessary to have a right to democracy guaranteed. On this view, which is an argument based on negative duties of non-interference, what matters is that external actors are constrained, not that the level of political power guaranteed by the democratic right might vary significantly from state to state (see Miller 2008: 222-3). The duties of others are set by their rights. This view, however, overlooks the possible positive duties of institutions and individuals to help guarantee the rights necessary for the exercise of everyone's democratic right – even in currently nondemocratic states.

Even if some would object that there are no duties of international justice, states could still be said to be less than fully democratic externally if their own citizens' rights are guaranteed and they have the ability to assist foreigners but do not. How domestic and international duties should be balanced, however, is a topic for another paper.

Conclusion

Some might think that all democrats are human rights proponents, rendering a paper that aims to connect the two ideas irrelevant. This, however, overlooks the inveterate disagreements of both democratic and human rights theorists and practitioners over how to define and what to include in their theories. The principal theoretical contribution of this chapter is to delineate and explain how one aspect of a definition of representative democracy has a necessary connection to certain human rights, even when we only accept a minimal procedural conception of democracy.

Besides adding to the theoretical understanding of which rights democracy requires, my argument provides practical fodder for political reformers and social activists by showing which rights democracy demands of rulers. For example, Kazakhstan's constitution states that it is "democratic" yet Freedom House in 2005, using a scale from 1 (free) to 7 (not free) assigned it a 6 on political rights and a 5 on civil liberties, calling it "not free" (Tilly 2007: 1-3). Claiming to be democratic and violating political and civil rights (among others), I argue, is conceptually incoherent. Kazakh – and other – reformers can use my argument to pressure government

officials by using the claim that some rights are required for a government to be democratic. Whether this will lead to improvements in the short term is unlikely. But over the longer term, adding a convincing democratic argument to reformers' tool chests may allow them to convince more people and build stronger pro-democracy social movements. Not only can nationals of the rights violating country draw on this argument to push for democracy. Foreign policy experts, foreign aid specialists, voters in the aid providing country, and others, can and should expose an antidemocratic foreign policy whenever their country's actions or omissions support regimes that violate basic democratic rights.

Chapter 2

A Democratic Justification for (Nonmilitary) Humanitarian Intervention: Reconciling Human Rights and Collective Self Determination Justifications for Violating State Sovereignty

Introduction

When is it morally acceptable for some actor or combination of actors – a state, a supranational institution, a NGO, a corporation, or others – to nonmilitarily intervene in another state's affairs for humanitarian purposes without the target state's consent? By nonmilitary humanitarian intervention I mean any violation of state sovereignty that does not involve violence having as a central reason for taking action protecting human rights where there is substantial evidence in the outcomes of the intervention of this humanitarian motive. State, nonstate, and supranational actors can violate state sovereignty by a number of nonmilitary means, including through some types of economic sanctions, international criminal law, and perhaps

even international development aid (Chatterjee and Scheid 2003: 1). In this chapter I draw on my argument in chapter 1 on basic democratic rights to reconcile two of the main arguments proffered as justifications for assessing whether there is a just cause for military humanitarian intervention, protecting human rights and permitting collective self-determination, to formulate an account of when and under what circumstances nonmilitary humanitarian intervention is justified.

Before moving on I want to clarify what I mean by nonmilitary humanitarian intervention.⁴ By nonmilitary I mean nonviolent, even if the nonviolent actions harm or kill people. Aerial bombing, assassinations no matter who commits them, invasions, and the like I classify as military or violent actions. Sanctions, embargos, asset freezes, arrests and the like are nonmilitary or nonviolent, even if they result in death. Military and nonmilitary humanitarian interventions are not mutually exclusive; the international community imposed sanctions against Qaddafi in 2011 with the stated aim to prevent him from harming civilians, and when he failed to comply, the international community began a military humanitarian intervention while sanctions were still in place. Humanitarian has two components. First, the intervener must have as a central motivation for the action the protecting innocents' human rights, especially innocent civilians. Besides just this stated motivation, which is often abused by powerful individuals, there must be clear evidence that this motivation is sincere. Saying an action is humanitarian but then ignoring the rules of war, for instance, or imposing sanctions for purportedly humanitarian

⁴ I use "humanitarian intervention" and "intervention" interchangeably in places. Because there are important differences between military and nonmilitary interventions, I distinguish those two concepts, though in a section focusing on one or the other I sometimes omit the antecedent qualifier to avoid unnecessary repetition.

purposes and then continuing the sanctions even when investigations show that they are disproportionate, from that point on annuls the humanitarian classification of the intervention. Intervention is widely accepted to mean a violation of state sovereignty. While I accept that definition to start, I press on what state sovereignty means and how this relates to individuals' consent. I do not see any way around having deep divisions about these definitions, especially about what counts as humanitarian. Because these divisions are inevitable, I try to be clear about what qualifies as military or nonmilitary, humanitarian or non-humanitarian, throughout, and use examples to allow readers to decide for themselves how we should categorize each.

Recent events show the urgency of advancing the discussion about nonmilitary humanitarian interventions. From 1990 to 2003 the UN Security Council (UNSC), almost exclusively at the behest of the US, imposed deadly sanctions on Iraq against its government's will that, by the best estimates, quietly killed half a million children and left its economy and infrastructure in ruins (Gordon 2006, 2010). Just as Iraq did not consent to the sanctions, Sudan neither assented in the spring of 2009 to the International Criminal Court's (ICC) first public arrest warrant for Sudan's president, Omar al-Bashir, nor did Sudan even ratify the ICC's Rome Statute. Angered by the warrant, Bashir temporarily expelled aid organizations from Sudan. No one knows how many additional lives Bashir's retaliatory decision cost. These two nonmilitary examples of infringements of state sovereignty raise pressing and interesting moral and legal questions. Whether these were for

humanitarian purposes depends on who and what you believe. Whether these cases were morally and legally justified may be even more controversial.

Since the horrific genocides, wars, and ethnic cleansings in the Balkans and Rwanda in the 1990s, and the concomitant military humanitarian interventions – and the omissions of intervention – have revived vibrant academic and popular debate about when military intervention is permissible or required. In recent years, numerous acclaimed just war theorists have rightly devoted considerable energy and ink to the intricacies of when military intervention is permitted or required, but academics have paid less attention to nonmilitary interventions that often carry equally weighty moral consequences (E.g., Doyle 2009; McMahan 2010; Altman and Wellman 2009; Tan 2006; Nardin and Williams et al. 2006; Chatterjee and Scheid et al. 2003). Had the half a million innocent Iraqi children been killed by bullets rather than the international community's and especially the US's withholding of basic biological necessities with approval of the UN Security Council, they would have likely garnered greater media and academic attention. But as the international lawyer Sonja Starr puts it, much of the current debate is driven by a crisis, and above all violent crisis, mentality (Starr 2007).

One reason Western policy makers and publics are reluctant to use military force for humanitarian purposes is known as the "Somalia syndrome." This is a calculation that politicians make that domestic constituents have no stomach for seeing fellow nationals killed abroad if the justification for war is humanitarian. Birthed after 18 US soldiers were killed in 1993 in Somalia (and ten Belgians were killed in 1994 in Rwanda at the start of that genocide to get Belgium to withdraw its

forces), it continues to shape policy makers' thinking. Although NATO did intervene militarily in 1999 in Kosovo, it did so by aerial bombing. Dropping bombs rather than dirtying soldiers' boots in Kosovo's soil drastically limited risks to Western soldiers, but also demonstrated the cowardice and callousness of Western politicians who put domestic politics ahead of effectively ending atrocities (Power 2002: XVIII; Wheeler 2000: Chapter 8). Although the US invaded Iraq in 2003, the primary justification was not humanitarian, but rather it was self and regional defense, premised on preventing Saddam Hussein from obtaining and stockpiling WMD.

At the same time that support for military humanitarian intervention waned, by at least the one measure of economic sanctions, nonviolent violations of state sovereignty increased. I focus on sanctions throughout as a representative example of nonviolent humanitarian intervention. Before 1990, the UNSC only imposed sanctions twice, whereas in the two decades that followed the UNSC imposed them at least 17 times against state and nonstate actors (Alexander 2009: xi; see too Cortright and Lopez 2002a). The US and EU outpaced even the post Cold War UNSC, imposing sanctions at least 50 times between 1990 and 2002 (Cortright and Lopez 2002b: 1). Although Wheeler is likely right that "intervention by force might be the only means of enforcing the global humanitarian norms that have evolved in the wake of the Holocaust" (Wheeler 2000: 1), nonviolent means are sometimes effective. Empirical estimates vary in effectiveness from merely 5% (Pape 1997) to 35% (Hufbauer, Clyde, Schott, and Elliott 1990). Others have suggested that some studies have had selection biases because they did not account for when states

threatened but did not have to implement sanctions, so they may be more effective, or that sanctions only work under certain circumstances (Drezner 2003; Hovi, Huseby, and Sprinz 2005). However often sanctions are effective, debating their morality is vital.

Another reason why nonmilitary humanitarian intervention deserves serious debate is because of the rapid evolution and increased salience since WWII of international humanitarian law (IHL), international criminal law (ICL), and international norms. Since 1945 and especially in the past decade, many although not all states, by their own consent, have eroded their own sovereignty by consenting to the UN Charter and the International Criminal Court (ICC), among other international treaties (e.g., Altman and Wellman 2004; Drumbl 2007). Norms, too, continue to evolve to undermine state sovereignty. The 2005 UN World Summit, for instance, culminated in the Responsibility to Protect (R2P) doctrine (Bellamy 2009, 2010; Evans 2008). For these three reasons – the reluctance of Western countries to use force for humanitarian purposes, the relatively common contemporary use of coercive sanctions, and unprecedented developments in international law and global norms – to mention just a few, nonmilitary humanitarian intervention is overripe for careful moral and legal consideration.

Scholars disagree about how to frame the issue of nonmilitary violations of state sovereignty and by extension nonmilitary humanitarian intervention (Gordon 1999: 123). To take one example, before WWI, sanctions were considered an act of war, but since then they have occupied a controversial penumbra between war and peace (Gordon 1999: 123; see too Walzer 1977: Chapter 10). Is nonmilitary

humanitarian intervention more similar to war, and should we thus apply just war theory to it, or is it more similar to peaceful relations, for instance, diplomacy, and so should we assess it by other methods than just war theory?

Given these controversies one might think that types of interventions should be divided in a few categories such as the following. First, there is full-scale military humanitarian intervention where a large number of soldiers invade in order to protect. The second sort would involve indiscriminate economic sanctions or other types of nonmilitary humanitarian interventions that directly adversely affect large numbers of people. The third type involves very limited and infrequent military aerial military strikes that kill far fewer people than the current US drone campaign against militants in Pakistan. The fourth type would include targeted nonmilitary humanitarian interventions such as travel bans, asset freezes, and international arrest warrants that target only a few individuals. One might suspect that such different types of interventions would require a different theory for each. I counterintuitively suggest otherwise for the *right* to intervene but the *duty* to intervene is different. What matters morally for the permissibility of intervention, such as rights violations, proportionality, respect for collective self-determination, and other just war precepts, are the same in each case. But because the demands on the intervener are generally more for military than for nonmilitary interventions, I focus primarily on the latter to suggest that when there is a just cause for nonmilitary intervention, it is often a duty to intervene and not just a right.

I draw on aspects of just war theory as well as debates about state sovereignty and conclude that some types of nonmilitary humanitarian

interventions are permissible, but only under limited circumstances. I stake out a middle ground that, like just war theory, eschews both the extremes of pacifism, or the corollary of total rejection of nonmilitary intervention, and political realism, which claims morality and legality do not apply at least in international affairs, allowing for intervention whenever a state so chooses and for whatever reasons (e.g., McMahan 2007: 669). My central argument is that even those who believe that the principle of collective self-determination weighs heavily against justifications for intervention should support intervention whenever individuals' basic democratic rights are being violated because without the guarantee of such rights, individuals are not able to exercise their right to contribute to collectively determining the policies of a polity. To a large degree, this reconciles Walzer's views on intervention and his critics' views such as Beitz, Luban, and Doyle. One could apply this argument to military humanitarian interventions as well, but because military and nonmilitary interventions have some important differences, I address here the nonmilitary option.

The chapter proceeds in the following order. I first discuss two leading positions on state sovereignty and its limits, which provides the basis for when military humanitarian intervention is permissible. I suggest that whenever military intervention is permissible that nonmilitary intervention should be too. For those who disagree that just war theory is the appropriate analytic lens through which nonmilitary interventions should be assessed, I present a novel account of when nonmilitary humanitarian intervention is permissible. By reconciling collective self-determination and human rights, I argue for a justification that is more permissive

than what many just war theorists would countenance. I then consider when states can forfeit their rights to permit intervention, and whether nonmilitary humanitarian intervention is permissible or required, and whether consent, and the consent of whom, is necessary for an intervention to be just. I finally consider whether what I argue for is legal under international law.

The Morality of State Sovereignty and Intervention

In just war theory, there are multiple reasons that may qualify as a just cause for a resort to war, for instance collective self-defense. I will only consider here just causes for humanitarian intervention, i.e., when war is permissible to protect innocent civilians from harms including death (McMahan 2005). Various responses to what qualifies as a just cause for a humanitarian intervention center around two principles, state sovereignty and human rights, both of which I will discuss.

The justifications for and limits to state sovereignty are inexorably connected to when humanitarian intervention is permissible. Sovereignty's definition is widely accepted as the supreme authority within a given territory over of a certain people (e.g., Philpott 2001: 16-17). Purportedly originating with the international law treaty of Westphalia in 1648, over the centuries sovereignty and the state system has radiated out from Europe to blanket every terrestrial corner of the earth (except Antarctica, and the land where the UN General Headquarters is located). Although sovereignty has never been absolute, it has weakened over time (Weiss 2007: 12). Since WWII, norms such as human rights that have become increasingly accepted and international law, which states themselves in many cases have consented to,

including the UN Charter, the Genocide Convention, the Geneva Conventions, and the ICC's Rome Statute, have further eroded state sovereignty compared with the early 20th century.

If military intervention aims at protecting individuals from horrendous human rights violations, why is it so controversial? On the face of it, it seems like it should be far less divisive than it is because what should matter is the morality or legality of a policy, and perhaps who decides a policy, but less so the nationality of a decision maker (Luban 1980: 179). But, as Jeff McMahan puts it, "the principal reason that humanitarian intervention is contentious is that it seems to violate the target state's sovereign right to control its own domestic affairs" (McMahan 2010: 44). This reason, however, just pushes back the question one step, demanding an answer to why a state's sovereign control of its own domestic affairs should be so revered. There are three main responses. One reason is to limit aggression of the powerful (states) over the weak (states). Another is that it permits collective self-determination, which acknowledges cultural, religious, traditional, ethical, and other differences among peoples. Although some such as Robert Goodin call for radically altering if not altogether abolishing state sovereignty as we know it in preference for an all affected interests principle of political organization, many contemporary theorists accept some states as morally legitimate, and only differ in when this is the case (Goodin 2007). A third objection to intervention is that it almost always violates some innocents' human rights, which raises the question of proportionality (on proportionality see Hurka 2005; McMahan 2009: 18-32). All three are potent

objections and must be addressed by any theory of when humanitarian intervention is justifiable.

Excluding the strand of political realism that denies morality exists or should play a role in international affairs, there are two broad theoretical positions regarding the moral permissibility of violating state sovereignty. I exclude this strand of realism because I am interested in the morality of intervention. Both use violations of human rights as a trigger for when humanitarian intervention is justifiable, but they diverge on how severe and how widespread the violations of human rights must be to justly intervene, as well as the reasons for intervention. My argument suggests that the distance between these two positions is closer than it first seems, but before presenting my argument I lay out the other two.

First, Michael Walzer, who is sometimes branded a communitarian, is one of the most prominent proponents of the position that holds that collective self-determination, save for a few extreme exceptions such as genocide, matters morally and so state sovereignty should be strong but not absolute (Walzer 1977, 1980). Because they are not strictly humanitarian in purpose, I will ignore Walzer's permissive interventions in cases of representative secessionist movements and counter intervention in response to another state's unjust intervention (Walzer 1977: 90, 108). This leaves three cases in which Walzer permits intervention, including massacres, enslavement, and mass expulsion. By granting states strong but not absolute rights to sovereignty, he places collective over individual sovereignty as more morally important, except in a few, rare, circumstances. A state is legitimate on this account if there is a "fit" between the people and its government,

by which Walzer means if its people are “governed in accordance with its own traditions” (Walzer 1980: 212). This “rules out intervention in cases of ‘ordinary’ oppression” because we cannot assume that there is a case of misfit except in the extreme circumstances (Walzer 1980: 218). Foreigners are not in a position to know that there is a bad fit between a people and its government because foreigners cannot garner enough information to make such judgments – except for three cases Walzer supports (Walzer 1980: 212). Notice that Walzer’s argument is not that the proportionality condition of just war theory must be met for intervention to be justifiable, but rather that even if it could be met, potential interveners must still refrain on moral grounds if there is sufficient fit between a government and a people because of lacking a just cause.

Why this is so remains unclear (Luban 1980b: 395; Beitz 2009: 334). Why should we be able to know that slavery, but not everyday torture, creates a misfit between a people and their government? Furthermore, why, even if there is a “fit” between a people that is ordinarily tortured or often has other serious human rights violated, should this somehow justify nonintervention? Walzer’s critics make just such points and endorse a more permissive account to protect human rights.

The second, alternative, position on state sovereignty places more value on individual rights than Walzer does, and roughly holds that state sovereignty is only legitimate in so far as it protects individual human rights (Luban 1980a, 1980b; Beitz 1980, 2009; ICISS 2001; Bellamy 2009). If, as Dworkin claims, human rights generally “trump” most other considerations, intervention is more easily justified than if one places emphasis on collective self-determination (Dworkin 1984; Luban

1980a, b). The argument is straightforward. To oversimplify, if governmental or nongovernmental agents are violating individual rights that are more important than rights of political self-determination, and intervention would prevent further violations of these more important rights, then intervention could be justified. But because of other conditions that constrain when military intervention is justifiable, such as proportionality, intervention is not always the best option when human rights violations occur (Luban 1980a: 175).

Military Humanitarian Intervention and its Problems

Contemporary just war theorists generally are in consensus about the definition of military humanitarian intervention. According to this consensus, intervention must occur by an armed group which is almost always one or more states' militaries without the target country's consent or in other words be coercive at the state level of analysis, and the interveners must have at least one humanitarian motive although they may have others (McMahan 2010: 44; Pogge 2003: 93).

The more controversial question is when is military humanitarian intervention morally justifiable? Although more contentious than a definition, there is some degree of just war theory consensus on this too. Six conditions must be met for an intervention to be legitimate (Altman and Wellman 2008: 229-31 and *passim*; Wheeler 2000: 34 and Chapter 1). First, often termed the "just cause," military humanitarian intervention is only permissible when there are widespread grave violations of human rights such as genocide and crimes against humanity, and not

permissible with only “typical” levels of human rights violations, although this has been challenged. This is where the debate about state sovereignty comes in, and where I focus my attention. Second, intervention must be proportionate to the harms prevented, which is a comparison of the number individuals harmed by the war who have not made themselves liable to be maimed or killed, typically innocent civilians, with those likely to be harmed and killed without intervention (Hurka 2005; Mellow 2006; McMahan 2007: 674; McMahan 2009; McMahan 2010). Third, it must be a last resort. Fourth, it must be carried out by a competent authority and, fifth, it must have a reasonably likely chance of success. Sixth, the intervener must distinguish between civilians and combatants and only target combatants who have made themselves liable to being killed (McMahan 2009).

Although many agree that military intervention is only justified when harsh, intentional, and widespread abuses of human rights occur, it is not clear why the bar should be so high (cf. Altman and Wellman 2008). Why should a leader, just because she is a leader, be given immunity from not only criminal and civil liability but also from policies that rescue those she abuses as well, if she is merely abusing human rights at an average level? There are two ways that theorists attempt to justify the bar being set higher for political leaders than for private individual citizens, neither of which I argue adequately justify nonmilitary nonintervention.

First, leaders, at least democratically representative leaders, supposedly embody the collective will of a people. Although at a glance this may seem like a reasonable view, it is implausible. There are problems in assuming this even in a representative democracy. Given one view of representation this is problematic

because political leaders often do not keep campaign promises, and so even if they win more than 50% of the vote, their policies may represent merely a minority of those who voted (to put aside for the moment all of those who do not vote).

Politicians, additionally, have to make choices about unforeseen events that few can anticipate and about which none can vote until after major decisions have already been made. For example, Obama, without congressional approval, decided military force was the appropriate way to respond to the 2011 crisis in Libya. Furthermore, majoritarian and to a lesser extent proportional representation election decision rules often result in a sizable dissenting minority. These observations call into question whether major decisions by democratic leaders can ever fairly be deemed collective self-determination. Even if we put these damaging objections aside and assume that leaders are always representative of a majority or supermajority, it is not clear how this is supposed to justify them committing human rights violations. If a police force of a representative or dictatorial government unjustly violates the human rights of some, the harms remain morally objectionable and illegitimate.

Second, others argue that because leaders may be institutionally constrained, forcing them to choose among options all of which will harm some people even if one or more choices minimize harms, their actions should be excused. This is what Michael Walzer calls the “problem of dirty hands” (Walzer 1973). Rulers and their apologists may argue that they should not be liable to intervention so long as they minimize harms. Or they might make an argument more deferent to state sovereignty, prohibiting intervention so long as rulers make the better choice for their citizens even if some are harmed. But even if a leader minimizes dirty hands

that does not on my account exempt a society from intervention. A society could still be liable to intervention if individuals' rights are under fulfilled, although if a leader minimizes harms she may not be liable to an intervention that holds her morally or criminally liable for her choices. If these two defenses fail, why else might the bar be set so high?

Military vs. Nonmilitary Intervention

Proportionality is a third key reason scholars believe military intervention is rarely justified and a central reason why scholars traditionally separate military from nonmilitary actions. But I argue in this section that by exploring the differences between military and nonmilitary intervention, the traditionally bright dividing lines between the two blur. Military intervention is a blunt instrument that virtually assures widespread loss and abuse of innocent life and material damage (Altman and Wellman 2008: 234-6). "Pinprick" bombings that the US launched against Iraq throughout the 1990s after the first Gulf War or the more recent US drone bombings in Pakistan (which may not be interventions at all since there is at least tacit consent from Pakistan's government), are the exception, not the norm. And even then we witness innocent civilians being killed regularly. Nonmilitary intervention, however, has the possibility of targeting individuals specifically, although often policy makers have chosen options that harm civilians and innocents.

Nonmilitary action is generally assumed to not have such widespread harms. This is true for some actions, but not for others. Here are a few examples. Should the 1990s sanctions against Iraq, for instance, be considered less wrong because they

were nonviolent, whereas the sporadic bombing of same country during the 1990s after the first Gulf War, despite killing far less people, be condemned as worse just because it was violent (Gordon 2010: 208)? A statement by Ethiopia's foreign minister about a counterinsurgency strategy in the mid 1980s when over one million people died from starvation – "food is a major element in our strategy against the secessionists" – raises the question whether a food policy can be as deadly as a war can be (as quoted in Meredith 2005: 343). By seizing bank accounts, imposing travel bans, issuing arrest warrants, and other forms of targeting individuals, nonmilitary intervention has the possibility of limiting harms to innocents. But so too does violent action. Some might think that the military corollary is assassination because it targets and affects only one or a few of the most responsible persons and, secondarily, their networks, not the population at large. Although widely condemned, Altman and Wellman make a strong case for why assassination should be acceptable and even preferable to military intervention if the conditions for a just war are met (Altman and Wellman 2008). But they fail to consider nonmilitary options because they think that "nonviolent options will often be insufficient to stop" human rights violations (Altman and Wellman 2008: 250). This is a serious worry and one that practitioners have to weigh carefully. In their call for an international institution that could authorize assassinations, they fail to consider a similar institution that would I think be more realistic that could, against a state's wishes, arrest and bring to trial such human rights violators (Altman and Wellman 2008: 254).

This discussion highlights a vital concern, the principle of discrimination, which is a way to understand why military and nonmilitary interventions should not be subject to different standards. Some nonmilitary actions such as sanctions are indiscriminate, i.e. they don't differentiate between those who have made themselves liable to harm and those who have not, sometimes distinguished as combatants and noncombatants even though recently McMahan and others criticize this simplistic view (McMahan 2009). What should matter, I suggest, is not whether an intervention is military or non-military, but whether it meets the just war requirements. If this is correct, then some military interventions may be permissible even when nonmilitary interventions may not be. For instance, someone might claim that if there were a just cause for a military humanitarian intervention in Iraq in the early 1990s and the other just war criteria were met, given what we know now about the harms done to civilians by the sanctions, the military intervention would have been preferable. Because the Iraq sanctions were disproportionate, they would be prohibited by an extension of just war theory's proportionality criterion to nonmilitary cases. Another way to put my point is to say that the proportionality and just cause conditions cover both military and nonmilitary actions.

This argument undermines the "last resort" condition of just war theory.⁵ Traditional just war theorists might assume that sanctions must always be employed, as part of the last resort condition, before war can be justifiable. This highlights a tension within just war theory. The last resort criterion may conflict with the proportionality criterion, if one expands the scope of assessment, as we

⁵ Thanks to David Mapel for this point.

should, beyond just the effects of war to the effects of sanctions and other nonviolent foreign policy choices a polity can make. The point of the last resort criteria is to prevent a too hasty resort to war because of the unnecessary harms that this would cause. Another way to put this that I think is in keeping with spirit of the condition is to say that war is only permissible when no better options are available. What matters morally on both interpretations are the harms that last resort condition is meant to avoid. If true, then proportionality matters more than last resort because proportionality covers the harms that last resort is meant to protect (for a similar view see Hurka 2005: 37). The result of my argument is that war may be sometimes morally preferable to sanctions or other policies if the war, but not the nonviolent policies, meets the just war criteria and especially the proportionality criterion (excluding last resort). The last resort criterion is hence limited by the proportionality criterion.

Although military might is often considered different in kind from nonmilitary actions, at least in the case of humanitarian interventions, it should be considered merely different in degree because military and nonmilitary interventions have similar morally relevant features. In both, large numbers of people can die horrible deaths because of action or inaction taken by other humans, state sovereignty can be violated, individuals' consent can be ignored, and so on. Although violence can be separated from nonviolence, one is not always morally worse than the other. For these reasons nonmilitary humanitarian interventions, if they meet the just war precepts, should be permissible whenever military humanitarian interventions are permissible. Notice here that I said nothing about

the relevant distinctions of military and nonmilitary action for when it may be required, and not just permissible. Below I suggest that there are relevant distinctions.

I next turn to an alternative to both Walzer's and his critics' accounts of when interventions are permissible. Any such theory must tread gingerly because being too permissive will permit abuse, and being too restrictive will allow states to abuse their citizens, both costing lives. My account draws on, but is separate from, both Walzer's and Walzer's critics' accounts by developing an argument that can justify intervention when actors violate human rights *because* violating human rights undermines collective self-determination. Notice that human rights as well as collective self-determination both still matter on my account, but the reasons why human rights matter and how they relate to collective self-determination is where my account departs from others'.

A Democratic Derivation of Rights as a Justification for Intervention

My theory of nonmilitary humanitarian intervention reconciles Walzer's collective self-determination arguments with his critics who place greater emphasis on human rights. I do so by arguing that the only sort of collective self-determination that is legitimate is democratic self-determination, and that to effectively participate in a democracy every individual must be alive and have some fundamental human rights guaranteed. I call these basic democratic rights, in tribute to and as an extension of Henry Shue's argument that basic rights are those that are necessary for the exercise of all other rights (Shue 1996). The human rights I

defend are democratically basic, meaning that they are necessary to exercise one's democratic right to participation, not in Shue's sense of being required for all other rights. I have defended the argument that some human rights are necessary to exercise the right to democracy in chapter 1, and because of this I do not reproduce it in full but instead provide a short summary below.

Distinct from both Walzer's and his critics' arguments, I suggest that only if one's human rights are guaranteed to some minimal level can one effectively participate in collective decision making, and assume that nondemocratic forms of government are illegitimate. I take for granted this last assumption because others have made such arguments and to adequately defend it would require a lengthier argument than space affords me here (e.g. Shapiro 1999). An individual democratic right to participation has two components. One is a minimal opportunity to exercise political power, which at least requires the opportunity for all adults to vote. The second is a minimal opportunity to politically influence others. To guarantee this right, other rights must be guaranteed. To illustrate why, an example is helpful. If one's right to subsistence is not guaranteed, i.e., if one starves to death, then one cannot vote and one's right an opportunity to democratic participation is violated. Similarly, if one does not have a basic education, one cannot make a sufficiently informed choice about the candidates running for office. My account sides with the more permissive critics of Walzer, suggesting that proportionate intervention is justified whenever serious violations of human rights occur, but also appreciates Walzer's contention that collective self-determination is morally important. This is an instrumental justification for why human rights are important, but it does not

deny that human rights are intrinsically valuable; that human rights are intrinsically important and instrumentally required to exercise one's right to democracy are not mutually exclusive positions. Another way to put this is that *if* collective self-determination matters morally, then the only way to guarantee that it is indeed collective choice, and not just some subpart of the collective making a choice, is by guaranteeing everyone's human rights that are necessary to exercise the right to democracy. The conclusion from this is that whether one intrinsically values human rights, as Walzer's critics do, or whether one values collective self-determination, as Walzer does, human rights are indispensable on *either* account, and intervention can be justified so long as the other conditions from just war theory are met But how might such a theory get around the problem of states' rights?

Forfeiting Rights, Unable or Unwilling States, and Intervention

States have two broad ways that they fail to guarantee their citizens' human rights. Either states are unable to do so, commonly because of poverty (e.g., Mali, Kenya, Bolivia) or a weak central governments (e.g., Somalia, DRC, Colombia), or because they are unwilling, and in these cases the state is often the perpetrator of or complicit in the human rights violations (e.g., Burma, Sudan). As Nicholas Wheeler puts it, "states that massively violate human rights should forfeit their right to be treated as legitimate sovereigns..." (Wheeler 2000: 12, original is italicized). Embodied by the doctrine of the "responsibility to protect" (R2P), there is an emerging consensus that state sovereignty should be conditioned on some minimal level of responsibility of a state toward its citizens, though where exactly this line

should be drawn is contested (ICISS 2001; Bellamy 2009, 2010). R2P holds that just as individuals who do not fulfill their general or special responsibilities towards others can forfeit some of their rights, if states are unable or unwilling to guarantee their citizens' human rights, although for different reasons, states can forfeit some of their rights as well.

Actors can forfeit a variety of different rights or bundles of rights depending on their actions or inactions. This is true even of the typical case of punishment (Morris 1991; cf. Boonin 2008). When a guilty criminal is punished for his wrongdoing, the state or the punishing authority can do some things that would otherwise violate an innocent person's rights, but it cannot do anything at all to the criminal. A robber may typically be fined or imprisoned but cannot be tortured, for instance. This is because the criminal forfeits some, but not all, of her rights. Scholars disagree about precisely which rights, if any, can be forfeited for any given offense. Generally, the worse the harm one inflicts on others, the more rights one forfeits. Paralleling the individual case, states and state actors can forfeit their rights along a continuum. Some state actions or inactions allow violation of state sovereignty, but not punishment or killing of a leader, whereas others permit regime change, arrest of a leader, and so on. It would require another article to argue for exactly which rights can be forfeited when, and why, so here I merely accept that actors can forfeit different rights for various (in)actions.

The justification for forfeiting rights here is different than that normally given to justify punishment. Although some have tried to justify sanctions as forms of punishment or expressions of moral condemnation, what Mark Drumbl calls in a

different context “expressivism,” these sorts of justifications are unnecessary (Gordon 1999: 138-40; Drumbl 2007: 173-80). Intervention is not meant as punishment, but as rescue (Altman and Wellman 2008: 252; Tan 2006: 92). The justification for a state or politician forfeiting their rights when they enact any policy except that which minimizes violations of human rights resides not in the right to punish, but in the right of others to rescue when their human rights are being unjustly infringed. Highly permissive, this account would allow nonmilitary intervention in the vast majority of states because leaders rarely, if ever, act to minimize violations of human rights.

Not only do many academics, pundits, and practitioners agree on the conditionality of state sovereignty, but so do even many states. As of November 2010, 114 states – more than 50% of the total – have consented to conditionally transferring the legal power to prosecute their own citizens for international crimes as defined in the ICC’s Rome Statute to the ICC, if the ICC finds states unwilling or unable to fairly try their own citizens. I leave aside for the moment important questions about whether one government can consent for following governments as Jefferson would have likely objected to, whether a state can “unsign” a treaty as George W. Bush did with the ICC, or whether state consent should imply some degree of citizen consent (Jefferson 1789 [1984]). For the states that have consented and exactly for that reason, indicting, arresting, and trying nationals of these countries would, on the state centric view, not technically be intervention. But it would be for states that have not ratified the Rome Statute, and perhaps it would

be if a government changes its mind about the ICC once its own government officials are indicted, as could be the case with Kenya.

How should we decide to what degree it is permissible to infringe on state sovereignty if the state is unable or unwilling to guarantee human rights? I suggest that those leaders who choose any policy except those that minimize violations to basic democratic rights can be liable to some type of nonmilitary humanitarian intervention, and the extent of permissible intervention is directly related to the basic democratic rights violations it could prevent, assuming the other just war conditions are met. This can be defended in two ways. First, humanitarian intervention is aimed at changing policy to prevent rights violations, but if a policy already minimizes violations of basic democratic rights, the intervention could by definition only do more damage. Second, this argument takes no position on the moral liability of the leaders, though it does suggest that they only forfeit or annul their rights when they decide to follow policies that do not minimize basic democratic rights. This would allow intervention even in cases where leaders do not intend to violate individuals' rights because individuals' basic democratic rights are still under fulfilled. In such cases, leaders moral liability has been circumstantially mitigated. The case may be similar to a driver who through no fault of her own strikes a careless pedestrian who had stepped into the street with too little time for the driver to serve out of the way. Whereas the driver is causally responsible, she is not morally so for she was not doing anything wrong, and she could not avoid striking the pedestrian. She was constrained by her circumstances. The precise degree to which moral culpability has been mitigated for the political leader is

unimportant here, but they have done nothing, in any case, that forfeits or annuls their personal rights. Of course, such a case is rare. Most leaders actively order violations of at least some basic democratic rights. The result is that almost all states are liable to intervention because most if not all powerful political leaders enact policies that violate some individuals' basic democratic rights.

Sovereignty of such kind states should be conditioned on them accepting some forms of development assistance to help guarantee the basic democratic rights of their citizens. Such states need not accept all forms of development assistance, however, because some is unfairly politically coercive, or worse. Nor should any and all development assistance be offered, as the record shows that ill-conceived development projects can empower dictators or even *genocidaires*. The World Bank loan to Chad in the 2000s unintentionally empowered Chad's dictator with over \$1 billion per year in oil revenue and the international community unintentionally empowered *genocidaires* in eastern DRC after the 1994 Rwanda genocide (Easterly 2010; BBC 2008; New York Times 2006, 2008; Terry 2002; Uvin 1997). Because of such failures, improvements in foreign aid must be made before states would have to accept development assistance (see, e.g., Gibson, Andersson, Ostrom, and Shivakumar 2005; Riddell 2007).

In addition to state rights, we should consider individual rights and how they relate to state rights. Because intervention often directly or indirectly targets a political leader or a cadre of leaders, it raises the question of when can civilian leaders lose or forfeit their right to not be harmed or killed by nonmilitary means? The individual analogy is a logical place to start.

Intervention and the Consent of Whom?

Generally, intervention is defined as requiring a state's dissent. This raises two questions. First, why should consent of the state, i.e., the consent of one or more high ranking individuals, and not the citizens as a whole within the state, matter, especially if the state is nondemocratic? Second, if it is the citizens and not the government of a state that matters, is intervention only justified with the consent of the people, and what percent of the people would have to consent for intervention to be just? Leaving aside the important yet practically difficult question of how citizens could express consent in tense and dangerous situations, I examine the first two questions in order.

For Walzer, only if there were not a "fit" between a citizenry and its government would violating state consent be permissible. On his critics account, if human rights violations were severe enough, state consent would not matter. My account is closest to Walzer's critics' position, but holds that state consent can only be violated if anyone's democratic basic rights are violated, because these individuals cannot be counted in the state's choice (assuming other conditions from just war theory, such as proportionality, are met). Even if all citizens' rights are guaranteed, that does not answer the question if the citizens must give consent for intervention to be justified and if they must, what percent must assent.

The typical discussion, premised on a dichotomy between state and individual consent, is misleading. State consent is still consent of an individual or normally some small collection of individuals (Wheeler 2000: 22-3). The question is more accurately framed as *whose* consent and *what percent of the population's*

consent should matter – if any – for intervention to be legitimate. Problems arise for defenders of the consensus view of military intervention once this question is appropriately identified. Why should the consent of a few, privileged, and often illegitimate, rulers, matter? Even if their consent should matter some, why should their opinion matter more than a state's whole population? Even if a state is a highly representative democracy and not a highly personalized dictatorship, the difference between the two of the percent of people who compose the state at the level of making a decision about intervention is still just a modicum of the general population. From public opinion polling we know that even in the most representative democracies leaders sometimes make decisions that go against a majority of citizens' wishes (more on the distinction between democracy and public opinion below).

Some recent contributors, however, do move the level of analysis down from the state to the individual. McMahan, for instance, argues that at least a majority of likely victims must give their consent in order for military intervention to be permissible (McMahan 2010: 48-55). Altman and Wellman, conversely, argue that majoritarian consent is not required because if a majority of likely victims were required to consent, then a majority would hold over the minority the power to have their human rights violated, a morally objectionable position (Altman and Wellman 2008: 242-5).

One might suspect that I would make a similar but distinct argument to Altman and Wellman, namely that because the rights that I argue for here are exactly those that are necessary to exercise a right to democracy, individual consent

is impossible exactly when it would be required to justify intervention. But my argument is more nuanced than this, and requires a two-part explanation. Consent is not the same as democracy, as I have argued elsewhere. A minimal right to democracy requires the opportunity to influence others to some small degree, but mere consent does not. Sometimes, someone could consent to an intervention even when her right to democracy is violated. In the extreme, however, say when people are killed, they can neither exercise their right to democracy nor consent. In the extreme cases, therefore, consent cannot be required for nonmilitary humanitarian intervention to be permissible. Besides death, the terror that such killing and threats of harms induces would render useless any purported consent. Conversely, when harms may be serious but not life threatening – especially given the mixed record of nonmilitary interventions – the potential intervener should generally seek consent of a majority. There is no easy answer to Altman and Wellman’s cogent fear. Their point is well taken. The opposite to seeking consent from a target population, however, permits the potential intervener to choose when, and when not, to intervene, which, history shows, can result in tragic consequences. It is not clear which option, letting the majority or the intervener choose, would prevent more rights violations. This is an empirical question, and even if one were to do such a study, it would be highly questionable because it would require counterfactual comparisons. I know of no such empirical studies. Given these two risky options, I would generally favor of seeking some sort of consent to intervention from those whose basic democratic rights are threatened, though not those facing death or serious harm. If, on the other hand, there is overwhelming evidence that a majority

is simply dissenting in order to perpetuate or allow a minority to be harmed, the intervener can disregard consent. To guard against self-interest, the potential intervener should seek independent verification of their viewpoint from, for instance, NGOs, other states, supranational actors and independent experts. Only if they are in agreement, should intervention be permissible.

Are Nonmilitary Humanitarian Interventions Permissible or Required?

Generally, justified humanitarian interventions are considered permissible but not required (Altman and Wellman 2008: 229-31). Some, such as Kok-Chor Tan, however, argue that military humanitarian interventions that are permissible are also sometimes required because the extreme human suffering that justifies intervention also generates a duty (Tan 2006). A main objection to Tan's argument is that war is always costly for the intervening state(s), including a significant risk of loss of life to their own citizens, considerable financial outlay, political losses of elected and nonelected leaders if the war goes poorly. Thus, states cannot have such a duty (McMahan 2010: 57). Such objections, I argue, does not apply to many forms of nonmilitary humanitarian intervention because none of the intervening individuals are put in lethal danger, and the financial and political costs are typically far less than those involved in war if the non-military humanitarian intervention is permissible.

The justification for a general positive duty to intervene, and the objection that it is too costly, is rooted in individual morality. At the local, individual, level, consequentialists and nonconsequentialists alike agree that if a great harm can be

prevented at little cost to oneself, one is obligated to take this action. A widely used example is if on a walk you noticed a child drowning in a shallow pond, you would be obligated to plunge in to rescue her, even though you may ruin your clothes or miss an appointment. Because consequentialists such as Peter Singer allow for greater individual costs than do most scholars who defend individual rights, I cite a few of the latter to support my point (Singer 1972). John Rawls argues that everyone has a “duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself” (Rawls 1971[1999]: 98). James Fishkin writes that “we would normally assume that if we can save a human life at minor cost, we are obligated to do so” (Fishkin 1982: 3). Similarly, Michael Green claims that it is generally accepted that everyone has a positive duty to act if “there is something obvious that I can do at little cost to prevent great harm” (Green 2005: 119).

I argue, first, that states have the same positive duty if the action they could take would likely prevent great harms and if the state would only bear a small cost, and, second, that often nonmilitary humanitarian intervention meets these criteria. Although states’ primary special obligations are to their own citizens, it is also widely accepted that they have some positive obligations to some beyond their borders. For instance, every rich country gives some foreign aid. Much – but not all – aid is given for strategic and not humanitarian reasons (Riddell 2007). Some has been given to simply help the destitute and underprivileged. What is more, about two thirds of the citizens of rich countries believe that their governments should give even more than they currently do (Paxton and Knack 2008: 27).

Unlike military intervention, which poses a real risk to intervening soldiers, the general population's finances, and in turn politicians' careers, nonmilitary intervention imposes only relatively small costs. These costs may include staffing time and administering sanctions, the losses in revenues and corresponding taxes to companies that are prevented from trading, and so on. Where, exactly, the line is drawn determining whether something is too costly to meet Rawls's, Fishkin's and Green's standards will remain controversial and I cannot specify it in any detail here.

A standard objection at the individual level to such positive duties that might be raised against states as well is that when the duty is extrapolated globally, such positive obligations become overly demanding (Murphy 2000: Chapters 1-2; Cullity 2004: Chapter 6; Fishkin 1982). If taken seriously, these duties would conflict with the typical liberal view that the individual is free in the vast majority of her choices to spend her time however she pleases (Fishkin 1982). This is so because as the world currently exists each individual could always, as Singer would have it, be doing more to save others from great need or harm, which would consume one's life (Singer 1972). The same objection does not translate to institutions such as states for two different reasons.

First, even if powerful states contributed to a nonmilitary humanitarian intervention they could fulfill their other obligations and special responsibilities. None of their citizens would have to risk violent death, politicians' careers would be secure, and relative to a country's government budget, the costs would be miniscule. A rough estimate for what the upper bound for what countries should be required to contribute to nonmilitary humanitarian intervention might be the financial costs

comparable to a country's foreign aid, ranging from about 0.2% of GDP for the US to almost 1% of GDP for Sweden (Gates 2010). This is surely a small cost, and the equivalent of which countries already spend abroad for humanitarian purposes in part. Small costs for rich countries might not be small for poor countries, even if measured in percentage terms. Second, if the positive responsibility to intervene nonmilitarily is too demanding for any given state, the responsibility for nonmilitary humanitarian intervention can and should be shared among various wealthy and powerful states and possibly other actors. In what follows, I offer some tentative ideas on how this responsibility should be distributed.

With Kok-Chor Tan, I will suggest that a combination of capacity and special relationships should play a role in assigning which institutions have the responsibility to nonmilitarily intervene, although I differ from Tan in what I think the relevant relationships are (Tan 2006). This proposition is generally consistent with the minimal positive duties that liberals accept and it avoids the over-demandingness objection that might apply if the responsibilities were assigned to less capable states. I can only start to sketch how these responsibilities should be assigned. Unlike with military humanitarian intervention, which can be carried out by one country, nonmilitary humanitarian often requires the coordination of many actors. For instance, although the US could unilaterally intervene militarily in some country, upholding sanctions or freezing an individual's bank accounts if they are spread all over the world typically requires at least several actors synchronizing their efforts. The only relevant special relationship, which can also be viewed as a special capacity, is whether an institution must be involved for a nonmilitary

intervention to be effective. For instance, if the international community wanted to freeze an African dictator's Swiss bank accounts, the Swiss bank where the dictator has his money is the unique actor that can comply with such a request. Otherwise, all states that have the capabilities to participate in the non-military humanitarian intervention and which will not place overly demanding duties on the state, however defined, should be collectively assigned responsibility for the nonmilitary humanitarian intervention. Not only can state, regional, and global institutions be assigned responsibilities on this account, but nonstate actors including corporations can be assigned responsibilities as well. These could be assigned by using the rough proxy of GDP in order to assign the percentage responsibility for intervention of each state. Assuming the counterfactual that there are only two countries for whom the intervention would not be overly burdensome, the US and France, if the US's GDP is \$9 trillion and France's GDP is \$1 trillion, the US should be burdened with 90% of the effort and resources for any given nonmilitary humanitarian intervention and France should be burdened with 10%. These assignments should be made after the required institutions (such as the Swiss bank) contributed the minimal it must to comply with the required sanctions.

Some might suggest that other special relationships are pertinent. For instance, the US might be assumed to have a special relationship with Liberia because of its colonial past (Tan 2006: 97). Indeed Tan claims that "a special [colonial] relationship can rightly identify an agent who can be said to have the perfect duty to act" (Tan 2006: 98). But this reason does not survive scrutiny. A colonial relationship is irrelevant in most cases of humanitarian intervention

because those who were in power during colonialism are generally now not even alive let alone in power, and it is unclear why that relationship should matter now for rescuing individuals against human rights violations. (I take no position here on reparations for past wrongs.) One way the relationship might matter is because of historical ties. Why historical ties should matter for humanitarian intervention is equally unclear to me, and indeed in some ways it seems like a continuation of a colonial mentality of the colonizer having responsibility for the colonized. Even in some cases where the colonizers clearly contributed to conditions that permitted terrible atrocities, such as with the German and Belgian colonization of Rwanda and their crystallization of Hutu and Tutsi ethnic divisions, it's unclear why later generations of that country have the responsibility to rectify their parents or grandparents' mistakes, especially because only part of the older generations were involved in colonization and even fewer made the decision to solidify purported ethnic differences. One way that the relationship might matter is by the wealth that was taken from the colonized and deposited with colonizer. Yet any relevant benefits that accrued to the colonizer from colonialism and survived or increased over time will be accounted for in my GDP capacity proxy, however, rendering the colonization relationship irrelevant. This is just a rough outline of how responsibilities should be assigned, and much more would need to be said to fully flesh this out. Another problem that deserves more attention than I can give it here are enforcement mechanisms, which would have to be resolved before any of this would be consistently effective.

One final concern is that there would be an additional reputational cost to interveners that raises the price too high. For instance, the US backed UNSC sanctions against Iraq might have damaged the international standing of US to a degree that would leave it vulnerable to terrorist attack or economic backlash that the US or any other actor or groups of actors should not have to bear. A few points undermine this objection. First, there is no empirical evidence that I am aware of that supports this view that just and proportionate interventions cause such backlashes. Second, the Iraq sanctions were deeply unjust by my and others' accounts. Were the sanctions just, there would likely not be such a backlash against the intervener – and indeed the standing of the intervener may have actually risen. Third, even if there were a backlash against a just intervention, this reputational cost would still be one the intervening state should be willing to absorb. Doing the right thing is not always popular; and taking no action may also undermine the reputation of powerful actors. I now turn to how my proposal may be practically constrained by current international law.

Nonmilitary Humanitarian Intervention in International Law

Under what conditions would the policy options and justifications that I argue for be legal or illegal under international law? Up to here, I have focused on the moral aspects of military and nonmilitary humanitarian interventions, whereas now I turn to the legality of them. This is important to consider for practical purposes and because if any of my proposal is not legal under international law,

there may either be good reason for this or there may be reasons to think that the law should change.

There are two separate legal questions related to nonmilitary humanitarian intervention. The first is whether the UNSC must approve it, or whether states alone or together, or other actors, can legally nonmilitarily intervene without the UNSC approval. The second question is whether there are other legal limits to either UNSC approved or disapproved nonmilitary humanitarian interventions. I discuss both in sequence and suggest that states and other actors can legally act without the UNSC support, the UNSC does have the authority to authorize nonmilitarily intervention, but there are other constraints on intervention besides just the UNSC such as the ICC.

The UN charter declares that member states enjoy “sovereign equality,” placing the domestic affairs of states clearly in the realm of state’s rights (UN Charter 1945: Article 2(1)). Internationally, states are limited in their actions. The UN charter holds that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state” (Article 2(4)). Notice here that only military threats and actions, not nonmilitary ones, are forbidden. Neither the UN nor other states can legally “intervene in matters which are essentially within the domestic jurisdiction of any state” (Article 2(7)) – except when the UNSC determines an issue threatens international peace and security. By granting strong legal rights to states, and not individuals, the UN Charter tacitly allows for significant domestic violations of

human rights, but of course a number of other international law treaties restricts domestic legal state action.

Although the UN Charter forbids states from using threats or actual uses of force against one another, it grants the UNSC the power to decide when military force *and* nonmilitary means should be used to “maintain or restore international peace and security” (Chapter VII (39, 41-2, quote from 39)). It is explicitly granted the power to “decide what measures *not* involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures” (Chapter VII (41), my emphasis). This clearly gives the UNSC the legal power to sanction nonmilitarily humanitarian intervention as well as the power to mandate states carry out its wishes, however weak its enforcement power.

Although the UNSC is granted the power to determine responses only when there is a threat to international, and not exclusively domestic, peace or security, although controversial, it has increasingly accepted that purely domestic human rights violations can trigger legitimate and legal violations of state sovereignty (Macklin 2009: 372). At once an interpretive body, determining what and when a threat to international peace and security exists (UN Charter 1945: Chapter VII (39)), as well as a policy making body, determining what an appropriate response is (Chapter VII(41-2)), the UNSC has broad powers. Because there is no chamber of appeals for the UNSC, in effect it can authorize whatever it would like and claim it does so for legitimate reasons, even if it is obviously incorrect or overstepping its mandate. Some, such as Hans Kelsen have even claimed that *anything* the UNSC does

is by definition legal under international law, though others have suggested otherwise (see Gordon 2010: 220-1). Kelsen's reading of the UNSC's power is too permissive because nowhere does it say that the UN charter should take precedence over other international treaty law, nor does all other international treaty law explicitly defer to the UN Charter. It may nonetheless be that parts of international treaty law, because its formation is ad hoc, is never comprehensively codified, and is implemented over time, may be in tension or contradictory (Miller 2003). This raises a possible paradox of conflict of different international laws because the UNSC could – as I argue it did in the past with the Iraq sanctions – legalize some sanctions that the ICC would now categorize as illegal (although, of course the Rome Statute did not come into force until 2002, after most of the sanction damage was done) (cf. Gordon 2010: 225-8).

As I argue elsewhere, many nonviolent yet deadly acts constitute a crime against humanity as defined by the ICC. Several conditions are required for the ICC's definition to be met. An "attack" must be widespread or systematic, directed against a civilian population, and meet one or more of eleven physical elements as well as a mental element (Rome Statute 1998: Article 7). Of the eleven physical elements, only one must be committed to be convicted of a crime against humanity. One *actus reus* is "other inhumane acts of a similar character [to the other acts listed] intentionally causing great suffering, or serious injury to body or to mental or physical health" (7.1(k)). Death I will assume without further argument qualifies as a "serious injury to the body" or physical health. The ICC defines attack and intent unusually. The Rome Statute defines "attack" as merely the "multiple commission of

acts referred to in paragraph 1 [of Article 7] against any civilian population, pursuant to or in furtherance of a State or organizational policy” (7.2(a)). The *mens rea* of the crime is similarly surprisingly low. Intent is defined as “the person means to engage in conduct” and is “aware that it [the *actus reus*] will occur in the ordinary course of events” (30.2(a,b)). The actor must also have knowledge of the policy, and this is defined as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events” (30.2(a)). The US met all such requirements by the mid 1990s if not before, as I next show.

Prior to the sanctions, Iraq imported 70% of its food (Gordon 2010: 21). It is no secret what will happen to a country that imports so much of its food if imports are quickly restricted. By 1991, GDP plummeted by 75%, and child malnutrition jumped to almost one in three by 1996 (Gordon 2010: 33). Half a million or more died during the whole sanctions period (Gordon 2010: 37 and n82). Children are civilians, and surely half a million deaths over years qualifies as widespread, so three of the five necessary conditions are met. Madeline Albright’s infamous affirmative in 1996 in response to a journalist asking her whether she thought the sanctions were worth half a million children’s lives shows that the highest levels of the US government had the intent and knowledge as defined and required by ICC to qualify as a crime against humanity, at least after that date (Gordon 2010: 157). Sanctions continued for another 7 years. This shows that the sanctions met the attack, *actus reus*, civilian, intent, and knowledge requirements after 1996 if not before.

Another case that was legally sanctioned by the UNSC but may have been illegal by current international criminal law standards is the 1991 weapons ban for Bosnia. According to Paul Williams, it was “for the ostensible purpose of promoting peace and security,” i.e. humanitarian purposes (Williams 1995). But prohibiting the Muslim community from buying weapons, “froze in place a gross imbalance in Muslim and Serb military capacity,” leaving the Muslims “largely defenseless” (Power 2002: 249). By refusing to put enough troops on the ground to halt the Serb advance and refusing to let the Bosnian Muslims arm and defend themselves, the embargo contributed to allowing Milosevic to commit genocide, ethnic cleansing, and war crimes (Power 2002: Chapters 9, 11). This too, may have been prosecutable under the ICC had it then been applicable.

Thus the Iraq sanctions and the Bosnia arms embargo were both legal by the standard of the UNSC approval, and may have been illegal according to ICC (if, counterfactually, it could apply its legal power retroactively). Instead of protecting international peace and security, the UNSC can be manipulated by powerful states to commit – and legalize – actions that would otherwise be prosecutable under international criminal law. What are we to make of this? By the standard of domestic law, if any single law prohibits an act, then it is illegal, but this case is different because the UNSC took action, rather than merely refraining to act, to authorize the sanctions. This paradox and controversy is mirrored by UNSC authorizations of military humanitarian intervention. Without UNSC approval, such military humanitarian interventions could, after 1 January 2017, be prosecutable under the ICC’s crime of aggression.

The relevant and pivotal difference in the domestic analogy is whether the intent – and outcome – of the intervener is humanitarian or not. Had the UNSC authorized the NATO bombing of Kosovo, for instance, and it was a good faith and executed within the *jus in bello* rules of war, NATO, I suggest, can and should be exempted from the charge of aggression. Although a state or organization may technically meet the conditions to prosecute under the Rome Statute, the prosecutor can and should use discretion to avoid justified humanitarian intervention cases. The ICC's prosecutor is granted the power to *not* investigate and try suspects when it might not “serve the interests of justice” or if the “interests of victims” may not be served by the proceeding with the investigation (Rome Statute 1998: Article 53(1(c))). But even if the stated intent of the US had been humanitarian at the start of the Iraq sanctions, because the intervention lasted from 1990 to 2003, and numerous reliable outlets relayed news of their devastating effects back to the US, the sanctions should have been changed or ceased. Instead, the US continued to impose invisible death sentences innocent Iraqis. Before concluding, I consider a few objections.

Objections

One objection to my argument is that it would permit too many interventions in practice, leading well-intentioned leaders who are overconfident in their assessments of success to abuse it, and badly intentioned leaders to lie in order to “dignify the sordid process of international politics” (Orwell 1945: 958). Exacerbating the worry is that more actors have the ability to intervene

nonmilitarily because the resources required are more widely available than they are for military interventions. Even with the rise of private military contractors, more nonstate actors can intervene nonmilitarily than militarily (Singer 2008; Pattison 2008). This raises the question of right authority from just war theory. Who should have the authority and who should decide who has the authority to intervene nonmilitarily? Although the UNSC is the closest body in existence that can currently legitimately authorize military or nonmilitary intervention, problems remain with it because, nonmilitary humanitarian interventions are sometimes morally permissible without UNSC approval as I showed. If and only if the UNSC approves an intervention is it legitimate is an inadequate way of addressing the problem (Buchanan and Keohane 2011). Constructing a legitimate institution that can provide an independent assessment of whether interventions are permissible or required is perhaps the best option, but that provides little guidance for today. My theory has built into it a few safeguards that should allay this objector's fears. First, it applies just war theory precepts, especially proportionality, to limit what is permissible and impermissible. The Iraq sanctions, for instance, would be ruled out under my theory. At the same time, it provides enforcement and deterrent mechanisms for egregious breeches of the proportionality standard through the ICC. Another safeguard is seeking the consent of those targeted for intervention under certain circumstances. Finally, as I mentioned above, only proceeding with intervention if other actors, such as Amnesty International, Human Rights Watch, other countries, and supranational bodies concur that the intervention is a justifiable, should prevent mistakes.

Another objection is that whenever humanitarian intervention is a duty, consent of those that would be rescued is irrelevant.⁶ To better understand this objection, consider the following individual analogy. If a lifeguard has a duty to help pull a drowning child out of a pool, the lifeguard does not need consent from the child – or anyone else – before she jumps in to save the child. Notice first that this objection is only relevant if the duty does exist, but is irrelevant if there is only a right to intervene. This objection seems plausible until one considers the plethora of options an intervener has. Even if there is a duty to intervene, the targeted individuals should perhaps have a say in the *type* of intervention. For instance, those who would be rescued might prefer a no fly zone to a military invasion, or they might prefer sanctions of a few leaders rather than indiscriminate sanctions on the whole country. Even in the ostensibly most obvious cases of where actors should intervene, such as genocide, *how* to intervene militarily is contentious. A state or an international organization could deploy a significant ground contingent of soldiers, or they could, like NATO did in Kosovo, decide to only bomb from the air. What is more, it is not clear how interventions should be combined. Perhaps a military intervention should be supplemented with a nonmilitary option, such as issuing arrest warrant for a genocide's architects. Thus even if there is a duty and not just a right to humanitarian intervention, consent from those who would be rescued about what *sort* of intervention they would prefer is important. That there are different types of interventions bring us to the final objection.

⁶ Thanks to Heather Roff for raising this important question at a talk by Jeff McMahan at the University of Colorado at Boulder on, I believe, March 14, 2008.

A third objection raises the good point that not all nonmilitary interventions are the same and because of this perhaps we should develop a more nuanced theory for each type (Walzer 1983). Here, however, I group all nonmilitary humanitarian interventions into a single category. One might think that different sorts of nonmilitary humanitarian interventions should be distinguished because some affect only one or a few people whereas others can destroy a whole country's economy and kill masses. A sanction preventing a single head of state from accessing a bank account and preventing him from traveling to Europe is quite different than broad economic sanctions aimed against a whole country. While true, collecting all sorts of nonmilitary humanitarian intervention together is appropriate for this theory because the just cause and proportionality criteria cover all types of interventions, and as I noted above, the relevant distinction for whether any agent has a duty to intervene can be drawn between military and nonmilitary. On my account, if someone's basic democratic rights were being violated, then there would be a just cause. But that is not enough to proceed with an intervention. The potential intervener would have to seek consent under some circumstances. Furthermore, it would have to meet all the just war theory requirements. These precepts apply in all cases.

Conclusion

I have argued that nonmilitary intervention is permissible whenever military intervention is, according to the just war tradition. Additionally, nonmilitary intervention is permissible in cases when leaders are unable or unwilling to

minimize human rights violations domestically contingent on other factors. This holds whether one views human rights or collective self-determination as more important because certain human rights are necessary to exercise collective self-determination.

We can now return to the opening examples of the Iraq sanctions and the arrest warrant of Bashir. On my account, the Iraq sanctions were clearly wrong because it was easily foreseeable and expected that the sanctions would result in widespread and disproportionate violations of basic democratic rights, as they did. These sanctions would have likely qualified as crimes against humanity according to the ICC's definition if, counterfactually, the ICC could retroactively prosecute. Bashir's case is more difficult. The best estimate is about 50,000 people lost their lives because Bashir expelled aid agencies in retaliation for the arrest warrant (as quoted in Hamilton 2011a: 197). How should we weigh this staggering death toll against the 98% of Darfuri refugees in Chad who supported the issuing of an arrest warrant in 2009? (Hamilton 2011a: 160)? Note that this is support not only for intervention, but the specific type of intervention. Instead of ordering an open indictment of Bashir, the prosecutor should have issued a sealed one. This would have at once responded to the wishes of nearly all Darfuris polled and given Bashir no reason to expel aid organizations. By protecting the basic democratic rights of Darfuris, contributing to deterrence when Bashir was arrested, and taking Bashir from power where he would be in no position to expel aid organizations, this option would meet the conditions for a justifiable nonmilitary humanitarian intervention. In the chapters that follow I use the arguments I develop in chapter 1 and 2 to

discuss specific cases of when and why state sovereignty should be violated. The cases include the ICC (chapters 3 and 4) and transitional justice (chapter 5).

Chapter 3

Improving Global Accountability: The ICC, the Resource Curse, and a Theory of Deterrence

Introduction

I argue that an existing institution, the International Criminal Court (ICC), can and should use its powers to prosecute nonviolent crimes against humanity, which can ameliorate the resource curse and horrific governance more generally. I present moral and legal arguments grounded in accountability for why and how the ICC should proceed. On moral grounds I argue that the powerful should be held accountable for more types of human rights abuses than they are currently perceived to be legally responsible for because nonviolent offenses can be just as morally blameworthy as violent ones (see Starr 2007; Marcus 2003; Altman and Wellman 2004; Skogly 2001). On legal grounds I argue that the ICC already possesses broader legal powers than is it is widely considered to have to try specific

types of nonviolent offenses that affect large numbers of people (Starr 2007; Marcus 2003). These policies would ameliorate the resource curse because they would increase the ICC's deterrence capabilities, contingent on better enforcement of its arrest warrants.

Global accountability deficits persist which are widespread, acute, and threaten the lives of many. Accountability gaps are present with respect to global democracy (Dahl 1999; Goodhart 2008; Goodin 2007; Gould 2004: Chapter 7), global governance (Grant and Keohane 2005), foreign aid (Wenar 2006), the UN and international economic sanctions (Gordon 2006), and international law (Altman and Wellman 2004; Drumbl 2007; Rubenstein 2007).⁷ Not only do pernicious gaps in global accountability persist, but also often the accountability mechanisms that do exist place the power of accountability in the hands of people who are not the agents most affected by decisions of institutions. This can create perverse incentives (Goodin 2007; Grant and Keohane 2005; Rubenstein 2007). For example, while many protesters claim that the World Trade Organization (WTO), World Bank, or International Monetary Fund (IMF) are not accountable, Grant and Keohane note that, in fact, those institutions are highly accountable, but not to the people who are affected by their policies. They are primarily accountable to the states that finance them, especially the United States.

Some might object that having globally unaccountable leaders is exactly how the world should be because states should be sovereign and therefore state leaders

⁷ Lacking accountability is not always cause for concern – for example, not electing Supreme Court justices can be beneficial for the rule of law and hence for increasing accountability (Hamilton 1778 [2003]: Federalist # 78-79). But notice that even the US Supreme Court is embedded in, and acts as, a system of accountability.

should not be accountable to anyone other than their citizens. Many have rightly challenged that strong interpretation of Westphalian sovereignty. Over the last century, norms and institutions, particularly domestic democracy, universal human rights, and international institutions have eroded impunity for actions both within and outside of the state. International law in general and international criminal law in particular have further curtailed impunity through tribunals such as those used after World War II, the Cambodian massacres, the Rwandan genocide, the atrocities in the Balkans, Sierra Leone's civil war, and many others (Mennecke 2007: 321). The ICC is another step in the erratic progress that actors have made over the past century to hold powerful leaders who were immune for too much of history to account for international or domestic actions.

The central purpose of this chapter is to provide theoretical as well as practical guidance on how this arc of accountability can be extended. I present these arguments in the following order. First, I briefly define accountability, and sketch the reasons global legal surrogate accountability is a favored method of constraining the powerful. Second, I present a reading of the foundational document of the ICC, the Rome Statute, and argue that the ICC can already bring leaders to trial for certain types of nonviolent yet atrocious human rights violations. Third, I use this reasoning to show how accountability may help ameliorate an intractable problem, the resource curse. The resource curse is the finding that poor countries that export large amounts of natural resources seem to do worse than similarly situated countries without abundant natural resources across a range of development and governance indicators. I suggest that general deterrence may be more effective for

nonviolent human rights violations than other types of crimes under the ICC's jurisdiction. Finally, I consider possible perverse incentives and objections before concluding.

I. Global Accountability

There are multiple ways to constrain power besides using accountability mechanisms, such as the balance of power or checks and balances (Borowiak 2007; Grant and Keohane 2005; Hamilton, Madison, and Jay 1787-8 [2003]; Gordon 2006: 80-81). A useful distinction Grant and Keohane make regarding ways to restrain power is between *ex ante*, or preventive constraints, which include the balance of power as well as checks and balances, and *ex post* constraints, which includes accountability (Grant and Keohane 2005: 30). *Ex post* accountability can also have a powerful deterrent component (Ibid). I will make use of accountability's *ex post* mechanisms to achieve *ex ante* goals. This use will be demonstrated to be morally and legally justifiable.

International political accountability necessarily comes in a different form than domestic democratic accountability because the globe lacks both a government and other methods of democratic accountability (Borowiak 2007; Rubenstein 2007; Grant and Keohane 2005; Buchanan and Keohane 2006). Globally, many imperfect measures of achieving some accountability already exist, including humanitarian intervention, economic sanctions, travel bans on a country's leaders, normative shunning, and international criminal prosecutions. A serious gap remains, however, between widely accepted norms and actions. Especially conspicuous is the

remaining space between what is widely viewed as minimally acceptable types of governance and sanctions for violating those norms.

The ICC is another tool that can improve global accountability in ways not before realized, thereby assisting to close this accountability gap (see Drumbl 2007: 10). The ICC should not be seen or used as the only way of achieving global accountability. For example, humanitarian intervention in some circumstances may be morally permitted or indeed obligatory. The ICC can and should be used to close this global accountability gap for several reasons. Pragmatically, the ICC is in the unique position of already possessing the legal powers to bring such perpetrators to trial. Morally, trying leaders for extensive nonviolent harms that they could have prevented would be a significant step in the centuries-long struggle for international justice. Additionally, it would expand what Sonja Starr has called the “crisis mentality” and international criminal law to nonviolent crisis situations (2007: 1258-80 and *passim*). Starr criticizes international criminal law as well as the ICC’s prosecutor for focusing only on violent situations. Nonviolent crimes are often just as much of a crisis for the victims and should be viewed as such.

What is accountability?

Standard definitions of accountability require at least two actors, a power wielder and an accountability holder, who are positioned in a relationship that includes:

1. *Standards* according to which the power wielder will be judged, and to which the power wielders and accountability holders agree, even if the agreement is flawed.

2. *Information* must be available to the accountability holders so they may adequately judge if the power wielder met their agreed upon standards.
3. *A right and power to sanction* the power wielder by the accountability holder (Grant and Keohane 2005: 29; Rubenstein 2007; Gordon 2006: 80; Wenar 2006: 5-7).

This is a standard version, exemplified by representative democracy. In a representative democracy, accountability holders are the voters and the power wielders are the elected representatives who are sanctioned by not being reelected. What is permissible for an elected representative is widely understood and at least implicitly agreed upon by those running for office. Information on the power wielders' performance is made available to voters through the media, voting records, and so on.

So far accountability has been defined monolithically, yet it is anything but uniform. Rather, it assumes different forms along various dimensions. One way of differentiating accountability is between a "participation" and "delegation" model. The former allocates power to those affected by a power wielder's action, and the latter entrusts agents with power to carry out the accountability holders' demands, though the accountability holders need not be the ones primarily affected by the agent's decisions (Grant and Keohane 2005: 31). An example of participatory accountability is representative democracy, and an example of delegation accountability is an NGO that remains accountable to its donors. Differences also occur in application, and to a lesser extent structure, including but not limited to

fiscal, legal, market, peer, reputational, supervisory, and hierarchical accountability (Grant and Keohane 2005: 35-37; see also Walzer 1983).

Globally, an alternative to the standard domestic models of accountability is needed because many countries are not democratic, and even those that are now democratic have no guarantee that they will remain so. Nor does democracy guarantee that leaders will not commit international crimes. Rubenstein (2007) presents a second-best model, called “surrogate accountability.” It can be used when customary accountability holders lack the power to sanction power wielders, allowing other actors to do so. Ideally these surrogate accountability holders would act in the interests of the original accountability holders. An NGO, for instance, may advocate for compensation for a farmer displaced by a dam project in China, because the farmer would not have the power to do so alone or collectively with other farmers.

Surrogate legal accountability is the variety exercised by the ICC because the “complementarity principle” holds that if and only if a state is “unwilling or unable” to prosecute the crimes enumerated in the Rome Statute may the ICC try individuals (Article 17, 1. (a); see Schabas 2007: 174-186).⁸ Under Rubenstein’s model, those represented are the harmed, murdered, or both. The surrogate accountability holder is the ICC. The standards – even if some leaders would like to see them changed and even if they are imperfectly applied – are those enumerated in the Rome Statute (Rubenstein 2007).

⁸ For an argument that the ICC’s first case, that of the Lord’s Resistance Army (LRA) in Uganda, may not meet this condition see Branch (2006).

II. The ICC and Criminally Bad Governance as a Crime Against Humanity

The ICC was established to bring to justice those international criminals who commit “the most serious crimes of concern to the international community as a whole” (ICC 1998: Preamble, see Article 1). Those crimes include four broad categories, namely genocide, crimes against humanity, war crimes, and aggression. Aggression was defined in the summer of 2010, but the court cannot prosecute it until 2017 (Scheffer 2010). My argument draws on only parts of crimes against humanity (ICC 1998: Article 7; see May 2004, 2006, 2006a; Altman 2006; Luban 2004, 2006; Mayerfeld 2006; Schabas 2007: 98-112).

The moral and philosophical grounds for crimes against humanity continue to be deeply controversial, and I will not take a position on the term here (Altman and Wellman 2004; Altman 2006; Luban 2004; May 2005; Vernon 2002). Rather, than discussing the term as a whole, I concentrate on a certain aspect of the way the Rome Statute defines it, unless otherwise noted. I use the Rome Statute’s wording to make legal argument for why some types of nonviolent crimes can and should be prosecuted.

To preview my central claim, I argue that the ICC already has language in its foundational document, the Rome Statute, to try leaders who commit some types of nonviolent offenses. Using article 7, which defines crimes against humanity, and article 30, which defines the *mens rea*, the Rome Statute has the legal jurisdiction to

try leaders⁹ for actions and policies that will foreseeably and avoidably cause widespread or systematic violations of some types of human rights to civilians *even if the human rights abuses are not intended*. I can make this argument because of the *unorthodox* definitions of “attack” and “intent” in the Rome Statute. My argument widens the jurisdiction of the ICC compared with the types of crimes the ICC is widely thought to have jurisdiction over and which it has prosecuted to date. Although others, most notably Starr (2007), have suggested that “grand corruption” can and should be prosecuted under the Rome Statute, I argue that the Rome Statute has an even wider purview. Other crimes—such as allowing or causing foreseeable and preventable starvation (e.g. in Ukraine in the early 1930s, in Ethiopia in the mid 1980s), or massive political corruption (e.g. in the DRC/Zaire under Mobutu), or terrible governance (e.g. under Mugabe in Zimbabwe)—can be moral wrongs that meet the ICC’s definition of a crime against humanity (Conquest 1986; Davis 2001; Meredith 2005: Chapter 19; Sen 1981, 1999; de Waal 1997, 2005; Wrong 2001; Human Rights Watch 2009). The actors that perpetrate these crimes should be held to account as well as violent international criminals.

Robust empirical findings link poor governance to widespread harms. For instance, Amartya Sen found that famines never occur in democracies, even poor ones such as India (Sen 1999: 152-3 and Chapter 7; D’Souza 1994).¹⁰ In recent years development agencies have adopted some of these findings into their work. Examples include the U.S.’s Millennium Challenge Corporation, which makes aid

⁹ I assume that everyone is under the ICC’s jurisdiction since the treaty came into effect on July 1, 2002, because under article 13 (b), the United Nations Security Council can refer anyone to the ICC.

¹⁰ There have been anomalies and some have questioned whether Sen’s theory is applicable in all cases, or just in most. For examples, see Rubin (2008), Shiva (2002), and Devereux et. al. (2007).

contingent on good or improving governance and explicitly focused research on governance through the World Bank's Governance Matters Project (Millennium Challenge Corporation; World Bank 2009). In short, although human rights sometimes are wrongly circumscribed to security rights, neither the 1948 UN Universal Declaration of Human Rights (UDHR) nor the Rome Statute limits human rights to security rights. Because this argument is controversial, I will deliberately walk the reader through the pertinent sections of the Rome Statute to make my case. I am indebted here to Starr who uses most of the same relevant sections of the Rome Statute to make a similar argument, but my argument expands crimes against humanity further than Starr does (Starr 2007: 1297-1306).¹¹

Crimes against humanity and attacks in the ICC's Rome Statute (Article 7)

The Rome Statute defines crimes against humanity in Article 7, paragraph 1, as:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Instead of reproducing all of Article 7.1, which includes 11 main and many additional lesser definitions of what may constitute a crime against humanity, I only focus on Article 7.1(e) and (k) here. I do this because, in conjunction with the stipulations noted above, to qualify as a crime against humanity only one of the 11 transgressions included must be met. Article 7.1.(e) and (k) read as follows:

(e) Imprisonment *or other severe deprivation of physical liberty* in violation of fundamental rules of international law;

¹¹ I italicize what are for my argument the vital words or sections of the Rome Statute and all the following italics are mine except where otherwise noted.

(k) Other inhumane acts of a similar character intentionally *causing great suffering*, or serious injury to body *or* to mental *or* physical health.

Paragraph 2 of Article 7 clarifies possibly controversial terms in paragraph 1, but the Rome Statute does not further elaborate on (e) or (k). Either severe deprivations of physical liberty or other inhumane acts that cause great suffering or serious injury to one's body, physical, or mental health that are widespread or systematic would constitute a crime against humanity. I am not eliding "attacks," "intent," or "knowledge," each of which I address in turn.

"Attack," in the Rome Statute, does not mean what the Oxford English Dictionary (OED) says it means, and what it is normally taken to mean, "the act of falling upon with force or arms, of commencing battle."¹² Rather, for the ICC's purposes, attack, as defined in Article 7, 2. (a) means:

a course of conduct involving the multiple commission of acts referred to in paragraph 1 [of Article 7] against any civilian population, pursuant to or in furtherance of a State *or* organizational policy to commit such attack.

This does not require military or armed security forces, but only conduct involving the multiple commission of acts, which includes almost any state policy and many nonstate actors' deeds (see Schabas 2007: 101-102). Proving intent and knowledge in a court of law may seem especially damaging to my argument, but below I show this is not the case because of the way the Rome Statute defines the two terms.

Intent and knowledge in the ICC's Rome Statute (Article 30).

Article 30 deals with whether an individual understands his or her actions:

¹² Accessed online at <http://www.oed.com> and the definition quoted is from section 1.a.

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent *and* knowledge.

2. For the purposes of this article, a person has intent where:

(a) In relation to conduct, that person means to engage in the conduct;

(b) In relation to a consequence, that person means to cause that consequence *or is aware that it will occur in the ordinary course of events*.

3. For the purposes of this article, knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

To be legally responsible, a person must have *both* intent and knowledge, which seems at first to significantly raise the bar for liability (see May 2005: 124-132).

Note, however, that intent, like attack, is defined unusually. A person must mean to engage in some conduct, but the second half of Article 30, 2. (b), reads that someone must simply be “aware that it [a consequence] will occur in the ordinary course of events.” Intent, here, just means being aware that an action will cause some effect “in the ordinary course of events” – one need not want to or hope to cause the consequences. This radically broadens what intent means when compared with a commonsense understanding of the term. The meaning of “knowledge” is similarly expanded. To have knowledge, according to the Rome Statute, one only needs “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.” One further point is important for my argument. Both intent and knowledge, as defined by the Rome Statute, have a prospective element. Actors are liable for the future effects of their actions.

In sum, to qualify as a crime against humanity all that is required are that multiple acts (7, 2. [a]) that result in widespread or systematic (7, 1.) severe deprivations of physical liberty (7, 2. [e]) or great suffering or serious injury to bodily or mental health (7, 1. [k]) be committed with the knowledge that these wrongs will occur in the normal course of events (30). Widespread is left open to interpretation, and I will use a conservative definition of this term to protect the argument from this line of criticism.

In fact, the court has already used similar reasoning, though to different ends. In June 2009, a three-judge panel used my reasoning for “attack” and “knowledge” in an indictment of an alleged warlord, Jean-Pierre Bemba Gombo of the Democratic Republic of the Congo (DRC) (ICC 2009: §73-89).¹³ An attack does “not necessarily equate with a “military attack”” (§75). The judges write, “the commission of the acts referred to in article 7(1) of the Statute constitute the “attack” itself and, beside the commission of the acts, no additional requirement for the existence of an “attack” should be proven” (§75). For knowledge, the court reviews the relevant sections of article 30 of the Rome Statute and then comments that “the perpetrator must be aware that a widespread attack directed against a civilian population is taking place and that his action is part of the attack” (§88). To be convicted, the accused need not know the details of the attack (§88). He must be aware only that the relevant wrongs will occur in the ordinary course of events (§87-8; Rome Statute 1998: Article 30 (3)). The ICC need not restrict this reasoning to crimes associated with war or conflict.

¹³ Thanks to Yvonne Dutton for this citation.

I will now show that some acts, as well as some omissions, meet the conditions discussed above, before providing a brief discussion of the definitions of “systematic” and “widespread.” Then I show that corruption and bad governance often result in widespread or systematic harms, and provide some evidence that leaders have at least minimal knowledge that their actions may result in these harms to civilians. What I don’t have to show for my argument to be cogent is equally important. A key point of the above exegesis is to show that neither “attack” nor “intent,” as we normally understand them, needs to be present because of the unusual way the Rome Statute defines those two terms.

First most legal systems hold people more morally and legally responsible for acts they commit than for omissions. The belief that people should receive harsher punishments if they wronged others or the state than if the same harms resulted from their inaction is translated into harsher punishments for actions than for omissions in legal systems. But the Rome Statute’s definition of crimes against humanity blurs that typical distinction because of its article 30 definitions of knowledge and intent. Individuals can be held criminally responsible for outcomes they do not mean to cause but will likely occur in the normal course of events. The basic point I want to make here is that doing nothing in a position of power will produce lots of consequences in the normal course of events just because one is in that position of great power. This means that some omissions are solid grounds on which to hold an individual criminally liable under the Rome Statute if the prosecutor can show that the leader foresaw that certain types of widespread or systematic harmful consequences would occur in the normal course of events. Thus

the Rome Statute inadvertently assigns international legal responsibility for acts and omissions, even if the authors of the statute did not so intend (in the normal sense of the word).

Some might object to my claim that omissions can qualify as a crime against humanity. “Neither the Rome Statute nor the ICC’s Elements of Crimes (“Elements”) mention criminal liability for omissions, other than in the context of superior responsibility,” Starr notes (Starr 2007: 1300). She is correct that “omissions will only be subject to prosecution if they breach a legal duty” (Starr 2007: 1300). But the Rome Statute smuggles back in criminal responsibility for omissions through its definitions of intent and knowledge. The pre-trial chamber has already declared that “omissions” can qualify as the mental element (ICC 2007: §353-5). For instance, terrible governance by repeatedly not responding to an outbreak of chorea despite a president having the knowledge of the outbreak and the ability to respond to it because he does not care or because he would rather pocket the money that would have been spent on saving lives could qualify as a crime against humanity. This results in a paradoxical conclusion because it would require leaders to minimize human rights violations of the relevant types to avoid committing a crime against humanity, at least to the extent necessary so that they would not be “widespread” or “systematic.”

The blurring of acts and omissions could undermine national self-determination because we typically think that states have much more leeway in setting domestic policy than my reading of the ICC would legally allow. The Rome Statute drastically redefines our commonly held beliefs about the limits of legal

responsibility for political leaders and many powerful nonstate actors as well. Legally, it makes almost every leader liable under international law since almost no powerful leader acts to minimize widespread of systematic harms of a the relevant type. This has a parallel in Michael Walzer's seminal 1973 article on political action and the problem of "dirty hands" (Walzer 1973). There, he claimed that the structures in which politicians and some non-official citizens must act puts them in positions in which all of their available choices are morally wrong. Whereas Walzer argues that the extremely powerful face a moral dilemma, I do not claim that the powerful face a legal dilemma. The powerful only need to pick policies that prevent widespread or systematic human rights violations of the specific types in order to avoid legal culpability. Many if not all, however, fall short of this goal. One might object that my argument undercuts the very purpose of the ICC, namely, to hold to account those who perpetrate the most egregious international crimes. But because of the prosecutor's discretion, she may correctly decide that most cases where she would be legally permitted to prosecute, should not be. Practically, then, instead of trying all possible international criminals, a more modest account should be adopted where only those who perpetrate major especially egregious nonviolent crimes against humanity should be prosecuted. Otherwise the ICC's docket would quickly swell to an unwieldy size and states would surely withdraw support for the nascent ICC.

Second, “widespread” means “distributed over a wide region; occurring in many places or among many persons” according to the OED.¹⁴ I use the OED here because it is likely the most respected English dictionary, and because the ICC itself uses it (e.g. ICC 2009: §29). “Systematic,” again according to the OED, means to “arranged or conducted according to a system, plan, or organized method; involving or observing a system; (of a person) acting according to system, regular and methodical.”¹⁵ The Rome Statute treats these as alternatives: only one needs to be met to qualify as a crime against humanity, contingent on the other qualifications (Altman and Wellman 2004: 48-49; May 2005: 122-4).

Next, I must make two points. First, I must show that corruption and other types of bad governance can and often do result in widespread or systematic harms to civilians. Second, must show that leaders have at least minimal knowledge that significantly bad actions, such as major corruption, theft, or permitting famine or other widespread harms, will “occur in the normal course of events” (Article 30 [b]). One caveat is that none of the following discussion applies to leaders who lack the capacity, such as money, material goods, or international support to prevent widespread harms or wrongs from occurring.

Empirical data show that corruption negatively affects both poverty levels and inequality (Gupta, Davoodi, and Alonso-Terme 2002). A study of corruption in the Philippines finds that corruption negatively affects multiple health indicators and that the poor are more affected than the rich (Azfar and Gurgur 2008). This

¹⁴ Accessed online at <http://www.oed.com> and the definition quoted is from section 2. Section 1. reads “extended over or occupying a wide space; broad in spatial extent.”

¹⁵ Accessed online at <http://www.oed.com> and the definition quoted is from section 3.a., the first definition; the first two have no substance and refer to 3.

suggests that preliminary empirical evidence supports the contention that corruption leads to widespread or systematic harms.¹⁶ In addition to this empirical evidence, basic logic makes clear that stealing from a state means fewer resources will reach a state's citizens or failing to act during a health crisis will likely produce widespread or systematic decreases in health and deaths. Despite this evidence and elementary logic, might leaders plausibly claim ignorance that their acts would produce consequences of the relevant sort and in this way avoid prosecution?

There are two ways to approach how much information leaders might possess. One requires documentary evidence proving that leaders knew that their acts would have criminal consequences. This is nearly impossible to show in a court of law, except if recorded documentation explicitly demonstrates a leader's thoughts. Many leaders take steps to not leave any sort of evidence, further complicating proof. This view is overly demanding and the high level of proof is not required for reasons of special responsibility. Responsibility plays a significant role here because it is widely accepted that leaders, and indeed anyone with great power, possess certain special responsibilities. These responsibilities include seeking out and gaining knowledge of what the likely effects of one's major political decisions would be.

Thus another approach, one that I countenance here, uses a standard that would apply to anyone who possesses some minimal capacity to reason, knowledge

¹⁶ The evidence need not be conclusive for my argument to be sustained because a significant part of the ICC's duties are to do the very investigations that would prove or disprove the connection between corruption, say, and widespread civilian harms. Someone might object that in corrupt countries, even if a high-ranking official does not steal, lower-ranking officials could, which results in the same or similar negative outcomes. Theoretically, though, if the higher ups cannot steal for fear of punishment, they may likely exert anti-corruption pressure on their subordinates as well. Nevertheless, if the high-ranking official did not steal, she would not be liable under the Rome Statute, though depending on the number of people harmed, the corrupt lower-ranking officials might be internationally criminally liable.

of how the world functions, and responsibility for learning the likely outcomes of one's actions (see Vanderheiden 2008: Chapter 6). The ICC's Elements of Crimes holds that "existence of intent and knowledge can be inferred from relevant facts and circumstances" (Elements of Crimes 2002/2010: General Introduction (3)). The ICC can reasonably assume that every leader possess the requisite knowledge of first-order effects because any reasonable person would who is an adult age and of average intellectual talent. Leaders typically keep themselves informed. Even Mao's famously fawning communist party comrades did not keep him totally unaware of the famine he caused through his agricultural collectivist policies (de Waal 1997: 18-9). Peng Duhai confronted the dictator with evidence of the famine: instead of changing policy, he purged Peng (Ibid.). (The Rome Statute permits exceptions, paralleling domestic law in some ways, through Article 31, "grounds for excluding criminal responsibility.")

What qualifies as sufficient harm in the Rome Statute?

Two further sets of questions now surface. First, what sorts of harms should qualify as "severe deprivation of physical liberty" (Article 7, 1. [e]), or "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" (Article 7, 1. [k])? Second, what should qualify as widespread or systematic? I consider the level of specificity for what qualifies as widespread or systematic. Being too specific will not permit inclusion of necessarily unique new cases that should qualify, but being too broad will contribute little to our knowledge or will be too vague to be helpful. For instance, if I suggest that at least 1,000 or 10,000 people must have their rights

violated by a leader's actions to qualify, it is unclear how we can move from the language in the Rome Statute to such a specific claim. The problem with this approach too is that leaders might harm 999 or 9,999 and thereby avoid prosecution, but this intuitively seems wrong. I argue for a middle ground between being overly specific and overly vague by erring on the side of generality and then illuminating my argument with concrete historical examples. My argument shadows the Rome Statute's language, which remains appropriately broad to include a variety of potential international crimes. Finally, in an attempt to convince the widest possible audience, I take a conservative stance on the first question of this section: What qualifies as sufficient harms under the Rome Statute?

During the Rome Statute's formative debates, some pressed for crimes such as mass starvation to be included as a crime against humanity, but that language was ultimately rejected (Schabas 2007: 105). Given this rejection, is it legally permissible to interpret that another section outlaws these sorts of crimes? The standard way to interpret treaties comes itself from a convention called the "Vienna Convention on the Law of Treaties" from 1969. The relevant clause says that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Vienna Convention 1969: article 31 (1.); see too Schabas 2007: 200-1). This highlights a possible tension in how to interpret international law. On the one hand, it is valid to read and interpret the language of an international treaty straightforwardly. On the other hand, there is a long tradition of looking to the intent of the founders by referring to the *travaux préparatoires* to assess how any

given clause of an international treaty should be interpreted. Nothing in international law makes choosing the first over the second way to interpret international treaties illegal, and that is the legal tradition that I follow here.

Those who aimed to have famine included in the Rome Statute did not ultimately fail, however. The first question above was, what harms should qualify as severe deprivation of physical liberty? Roughly, I answer that several but by no means all violations of the human rights enumerated in the UDHR should qualify, although I concentrate only on the least controversial examples. Death, surely, is a severe deprivation of physical liberty. Malnutrition is one common example of serious injury to physical and mental health even if one can sometimes recover from severe malnutrition. Because some might object to the mental injury component, I limit my argument to physical harm. Of course not all death or malnutrition is or should be criminal. But I assume that causing death by starvation or severe malnutrition are severe physical harms is uncontroversial and need no further argument. Note that death and malnutrition can be caused in numerous ways, including active diversion of food and aid, as was the case in parts of Ethiopia in the mid 1980s, or in Sudan after president Bashir was indicted by the ICC in 2009, or by stealing money that would otherwise go to life- or nutrition-sustaining programs, or by implementing policies that cause foreseeable and avoidable widespread or systematic harms.

Some examples may be helpful. The DRC's (previously Zaire) former dictator, Mobutu, pilfered billions of dollars from state coffers as his citizenry, it is estimated, survived on an average of less than \$120 per year in 2000 (Meredith 2005: Chapter

17; Wrong 2001, income estimate from Chapter 11). As Wrong writes, “Whatever bloody deeds were carried out on his orders, this will always constitute Mobutu’s worst human rights violation: the destruction of an economy that quashed a generation’s aspirations” (Wrong 2001: 315). But the ICC’s jurisdiction only starts from July 1, 2002, so it is useful to examine more recent cases, which I will now do for Chad and Zimbabwe.

Chad is a destitute, landlocked, oil-rich nation, which persistently ranks as one of the most corrupt countries on earth by Transparency International (Transparency International 2008; see also BBC 2008; New York Times 2006, 2008). In the early 2000s, Chad negotiated a loan from the World Bank to build an oil pipeline so it could export oil, and in exchange for the loan the World Bank demanded that Chad spend some of its oil revenue on development projects. Instead, Chad’s president, Idriss Deby, reneged on his promise and has been pocketing the estimated \$1.4 billion per year of oil revenues (BBC 2008; New York Times 2008). One in four adults in Chad is literate, child mortality increased between 1990 and 2006, and more than one in three children are underweight (New York Times 2008). Perhaps we should individually condemn Deby, but we cannot pass legal judgment; that is for ICC to decide and should only be done after a meticulous investigation. According to the ICC’s statute, there is at least enough preliminary evidence to indict Idriss Deby on crimes against humanity because he had the intent and knowledge (as defined in the Rome Statute) that his actions—at the minimum—would result in widespread and serious injury to bodily health, and probably much more.

Another example of a crime that the ICC has jurisdiction over, at least for those actions and omissions since July 1, 2002, is Mugabe's horrific mismanagement of Zimbabwe (Physicians for Human Rights 2009: 41-2). Ignoring for the moment the violence perpetrated by Mugabe's henchmen, Human Rights Watch correctly identifies Zimbabwe as "a humanitarian crisis that is the result of a political crisis" (Human Rights Watch 2009: 3). Because of horrific governmental mismanagement, the health system has collapsed: infant mortality is increasing at its highest rate in Zimbabwe's history, cholera has killed at least 2,000 people and sickened at least 39,000 more, and maternal mortality has tripled since the mid 1990s (Human Rights Watch 2009: 3, 9-23). What was formerly a breadbasket (Power 2003) now has 5 million people who are food insecure (Human Rights Watch 2009: 3). These facts are the result of horrific political decisions, and, under the Rome Statute, this is sufficient evidence to investigate and likely indict Mugabe and perhaps some other high-ranking officials on charges of crimes against humanity.

These examples of corruption and bad governance are two broad categories of crimes that I focus on, but my argument is not limited to these two. Rather, anything that power wielders do with consequences that are foreseeable, knowable, avoidable, effects of their actions, and produce either harms that are widespread, systematic or both, would qualify as a crime by the ICC. This is a rough answer to the second question posed above: which actions or omissions meet the criteria of widespread or systematic? These will be the focus of my discussion of the resource curse.

III. The Resource Curse and Its Causes

Nearly half of the world's poor countries depend on natural resources, requiring any policy that aims to lower the levels of conflict and destitution around the world to carefully consider if there is any viable solution to the resource curse (Slack 2004: 47). The resource curse is a paradox birthed of perverse incentives generated by the confluence of the economic and governance rules and institutions that prevail internationally and domestically. It would seem, at first blush, that resource-rich developing countries would tend to do better because of their resources, and the economic theory of comparative advantage suggests that countries should exploit and export what they possess in relative abundance (Slack 2004: 48). Actually, resource-rich exporting countries tend to have lower economic growth rates (Humphreys, Sachs, and Stiglitz 2007: 1), are less likely to be democratic or sustain democracy (Ross 2001), are more likely to be corrupt (Sala-i-Martin and Subramanian 2003), are more prone to civil war (Humphreys 2005), and may be more prone to coup attempts (for an argument for why they would, see Pogge 2008: Chapter 6; cf. Collier 2007: 36 for empirical evidence that does not support this theory). Additionally, some countries suffer from a variety of the resource curse known as the "Dutch disease," which I will not address because it is not relevant for this chapter.¹⁷

The main reasons for the resource curse are twofold. First, state leaders are unaccountable for many types of abuses of power that the resource curse generates,

¹⁷ The Dutch disease occurs when one export or one exporting sector, because of increasing demand for that country's currency, raises the real exchange rate, which makes other sectors less internationally competitive, thus decreasing those exports. Additionally, because of the increases in profits in the exporting sector, it can pull investment and workers away from the non-exporting sector, further depressing those industries. Further complicating these adverse effects, often the goods exported are primary materials with highly volatile prices, creating planning problems for investors, workers, industries, and governments (Humphreys, Sachs, and Stiglitz 2007: 5-8).

including corruption and kleptocracy. Second, the resource curse persists because of a flaw in international property rights that permits any leader who seizes power of a state to possess a property right to that country's natural resources. The leader can sell the resources on the international market, which increases the incentives for leaders to grab power by coups or civil wars, and to hang onto power through autocratic means (Humphreys, Sachs, and Stiglitz 2007; Pogge 2008: Chapter 6; Wenar 2008).

Any solution to this problem will have to take these two broad and problematic incentives into account, and the following areas are roughly the ones available for reform:

1. *International Demand* for primary resources
2. *International and Domestic Property Rights* that permit rulers to sell natural resources freely on the international market
3. *Domestic Factors*, such as democratization, economic diversification, reforming domestic property rights, privatization, natural resource funds, and so on
4. *Global Accountability*

Reforms 1, 2, and 3 are not politically feasible now or in the near future, leaving 4 as the most promising option, though this does not necessarily mean it is feasible either. It will be difficult, but possible, for the type of global accountability through the ICC for which I argued above to ameliorate the problems associated with the resource curse. I address each area of possible reform in turn.

1. International Demand

International demand for such products as oil, natural gas, minerals used in jewelry, cell phones, and laptop computers, among other goods, is a necessary but insufficient factor in explaining the resource curse. It is, Pogge notes, “very much in the interest of rich consumer societies” to keep a consistent and cheap flow of these goods into their countries (2008: 171). Most of us, probably every day, use devices made in, or consume materials from, resource-cursed countries. Our involvement in procuring resources from resource-cursed countries, Pogge argues, causally implicates us in an unjust global scheme of global institutions upholding the current economic and political order (Pogge 2008: 29-30), thereby generating obligations for us to work toward reforming the unjust institutions that we tacitly support (Young 2004, 2006). This may be the case, but I need not take a position on it here for my argument to be viable.

First, because oil, timber, and key minerals have become necessary for most developed and developing countries, curbing international demand is not realistic over the short term for such commodities.¹⁸ Any significant reform of institutions, especially property rights, such as Pogge (2008) and Wenar (2008) suggest, is not likely in the near term, whereas my proposal is implementable in the coming years, even if its effects may take longer to be realized. Notice that my proposal is compatible with Pogge’s analysis; they are not mutually exclusive.

¹⁸ This may not be the case for luxury items such as gold or diamonds, as the “Kimberley Process,” has shown (<http://www.kimberleyprocess.com/>), though recent reports have called its effectiveness into question (BBC 2009a). If there is a continuum between necessity and luxury, there is far less likely to be meaningful reform the more goods are considered necessities because consumers and governments are less likely to stand for possible supply disruptions.

Second, too many powerful interests are satisfied with the current schema for any significant proposed reforms to be effective in the near future. Perhaps through energy reform, recycling programs, and consumer education over the medium and long run, international demand can be diminished, but we, and especially the victims of international wrongs, urgently need a quicker alternative. To understand how goods are bought, sold, and transported from resourced-cursed countries to wealthy democracies and other countries, international and domestic property rights must be understood.

2. International Factors: international and domestic property rights

Currently international property rights differ significantly from Western legal conceptions of property rights, both in *how* someone or some group can acquire property rights, and in *how robust* property rights are. First, international property rights differ from domestic ones because, internationally, might generates a right (Pogge 2008: 147-149, 158, 168; Wenar 2008: 12-15). If crooks domestically overran a large corporation and installed themselves as the CEO and board members, the police would step in, reinstate the rightful owners, and bring the criminals to trial (Pogge 2008: 158). Internationally, however, if powerful domestic actors manage to overthrow a government, they gain the rights necessary to sell that country's resources, which is a significant flaw. Second, domestic property rights are less robust than international ones. Although all Western countries have strong property rights regimes, laws, and norms, nearly everyone has to pay taxes, which can be viewed as a mild and justifiable compromise of property rights (Murphy and Nagel 2002: 43-5). However, internationally there is no parallel

system of compromising a libertarian property right through taxation (see Pogge 2008: Chapter 8 for such a proposal). Finally, domestic property crimes are mostly one-off crimes. That is not the case with international property crimes. They are associated with governmental power and many nonstate actors, and are iterated crimes of some duration. This allows the perpetrators to amass more wealth and, hence, more power than is common domestically. These three differences between domestic and international property rights create powerful incentives for international actors to attempt to overtake a country's government for financial reasons, and to act more like businessmen aimed at maximizing individual profit – whatever the humanitarian costs – than to act as responsible heads of state.

Although property rights reform may be a promising path in some areas of global problems (e.g., Pogge 2008: ch 8-9), it is not feasible in relation to the resource curse. Powerful countries' governments and citizens have too many incentives to continue purchasing cheap goods from illegitimate rulers and allowing them to sell their country's natural resources on the international market as if they had legitimate and robust property rights (Pogge 2008: 171).

One recent example of property-rights reform that demonstrates the problem with such suggestions is Wenar's (2008). Part of his proposed solution to the resource curse is to enforce property rights, drawing on some human rights treaties to argue that citizens, collectively, have ownership rights of their country's natural resources. There are two problems with this idea. First, if it could be implemented, this might significantly ameliorate the resource curse (it has in a way been implemented in Alaska where everyone older than 18 receives about

\$1,500/year from oil revenue (Slack 2004: 55)), but it will fail in developing countries because of the distinct and harmful incentives discussed above. Why would a powerful dictator or even a democratic government voluntarily give up its revenue from natural resources? It is unrealistic.

Second, it is not at all clear that a state's citizens should collectively have a libertarian property right to their natural resources (Pogge 2008: 202).¹⁹ Pogge's proposal for a "global resource dividend," a tax of sorts on natural resources, would violate a libertarian property right, but this might be justifiable for Norway or other wealthy democratic countries that also happen to be resource rich (2008: Chapter 8). Similarly, because of the global importance of certain natural resources, such as Brazil's Amazon rain forest, which is rapidly disappearing, perhaps a country should not be permitted to use freely all of its resources. As Grant and Keohane note, "domestic democracy can improve accountability to citizens and, at the same time, work against the interests of people affected by government policies beyond state borders," (2005: 34). It is unlikely that incentives will be significantly realigned given the powerful actors in rich countries who wield significant influence over the international financial institutions that govern world trade. Thus international property rights reform remains an unrealistic way to deal with the resource curse.

3. Domestic Factors

A great deal has been written about domestic accountability, domestic democracy, what causes or allows countries to democratize. The resource curse, however, presents two challenges to both democracy and democratization (cf.

¹⁹ Thanks to Scott Wisor for bringing this to my attention.

Dunning 2008). First, the great wealth that autocratic leaders amass while in power allows them to use the wealth to repress domestic groups agitating for democratic reform, and the continual income from natural resources encourages autocratic rulers to hang onto power for as long as possible. Second, even if a resource-rich country manages to transition to democracy, the same perverse incentives remain for coup plotters and warlords to overrun a government for vast financial rewards. Although domestic factors could improve the problems of the resource curse, it is exactly the bad incentives that the resource curse generates that make domestic reform difficult. If full democratization is not possible, might partial democratization, especially electoral competition, make a difference?

Electoral competition is one key aspect but not exhaustive of most definitions of democracy. Such competition may actually harm resource-rich countries more than it helps (Collier 2007: 43-46). Whereas democracies without resource wealth grow more quickly than autocracies, natural resource-wealthy countries with electoral competition grow more slowly than autocracies (Collier 2007: 43). Collier notes, “our key point is that this same undermining of accountability operates within polities that, at least on the criterion of electoral competition, are democratic. What gets undermined is not electoral competition but the political restraints on power,” (2007: 46). While this is not to argue against democratization, it seems that even minimal democratic accountability, a necessary step in democratization, may not be sufficient to break the resource curse. Something else is needed (Collier 2007: 51).

4. Global Accountability: the ICC and changing incentives.

To recap, numerous others have proffered diverse solutions to the resource curse (Collier 2007: 140-146; Karl 2007: 269-74; Pogge 2008: Chapter 6; Sandbu and Shaxson 2009; Wenar 2008). Despite some astute political analysis, the central problem with these suggestions is a failure to adequately account for incentives. To oversimplify, the resource curse is a problem because powerful people benefit from extant structures while remaining unaccountable for consequences. All proposed reforms would necessarily deviate somewhat from the status quo. There is no guarantee that any proposal will be sufficiently close to, or will sufficiently alter, actors' incentives to be realistically implementable.

It should now be clear how my arguments fit together. The resource curse can be ameliorated by the global accountability mechanisms of the ICC through my reinterpretation of crimes against humanity. My argument takes incentives into account, and does not focus on politically improbable and dubious reforms that others have proposed to ameliorate the resource curse, concentrating instead on state leaders and potential coup and civil war plotters. I now turn to a key part of my argument: deterrence.

IV. Deterrence and Punishment

A goal of accountability: deterrence theory and property crime.

Deterring others from committing international crimes is one reason international law is important (Drumbl 2007; Luban 2006: 354; Mayerfield 2006: 361; Snyder and Vinjamuri 2003/4). Additional but not necessarily competing principles used to justify punishment are retribution and what Drumbl calls

“expressivism,” punishment for the sake of bolstering respect for the rule of law (Drumbl 2007: 11-12, 16-17, 60-63, Chapter 6), or the similar concept of “norm projection,” advocated for by Luban (2006: 354-355). Sometimes proffered additional reasons for punishment include reconciliation, reintegration, and rehabilitation, though some thinkers offer these as reasons for why punishment may prevent these exact outcomes (Branch 2007; Drumbl 2007: 12; Rodman 2006).

Deterrence is arguably the most important aspect of punishment in international law. Drumbl differentiates *specific* deterrence, which posits that punishment can dissuade individuals from recommitting crimes, from *general* deterrence, which aims to discourage others from committing similar crimes (Drumbl 2007: 61-2). I focus here on general deterrence, and use deterrence without its antecedent modifier because the crimes argued for here, at least at the upper command levels, deserve long-term jail sentences leaving the perpetrators with little chance of regaining sufficient power to recommit crimes. The importance of deterring similar criminals cannot be overstated. Specific and general deterrence may have some overlap in cases where a potential criminal decides that more severe crimes, in degree or kind, are not worth the punishment.

One objection to any deterrent argument, however, is that until recently scholars have not found empirical evidence that either type of deterrence works for international crimes (Drumbl 2007: 169; Mennecke 2007: 323; Snyder and Vinjamuri 2003/4). Obtaining evidence of deterrence is difficult. Testing to see if the ICC or other international criminal tribunals deter individuals from committing international crimes depends primarily on measuring counterfactuals in at least two

areas. First, measuring which international crimes were *not* committed because potential criminals were deterred from committing them is difficult because most leaders will never openly state that they would like to commit international crimes but were deterred from doing so by the ICC. Reasons for non-actions must be imputed and must remain guesses (Mennecke 2007: 324). Second, because the crimes punishable under the ICC's jurisdiction are different in kind from normal domestic crimes, due to their temporal duration and vast effects, deterrence might mitigate the degree of the crime even if one is still committed (Drumbl 2007: 169). As difficult as it is to find evidence of deterrence, Hunjoon Kim and Kathryn Sikkink do find support for proposition that if more violators of human rights are tried, others will be less likely to commit similar abuses in the future (Kim and Sikkink 2010).

One imperfect way to test deterrence would be through a natural experiment: did international crimes decrease after the ICC was established? Causal arguments could be made, but they would be fragile at best. Many more nuanced questions should be asked: did states that were under its jurisdiction see a decrease in international crimes?; did the ICC deter only certain types of international crimes under the ICC's jurisdiction?; did only certain geographical locations (such as Africa) see a decrease in violence because that is where, for political and prudential reasons, the ICC focused its first cases? Although empirical evidence for deterrence is mixed (Drumbl 2007: 169-73; Kim and Sikkink 2010), it remains important to think about deterrence carefully and rationally, as potential international criminals might. The following argument, then, should not be taken as definitive, but rather should be

assessed for its logic and plausibility, perhaps the best we can expect from international deterrence arguments.

Deterrence may be more effective for those who commit major property and mismanagement crimes than criminals who commit war crimes, violent crimes against humanity, and especially genocide. The basic idea is that because powerful people committing different types of international crimes have different motivations, the deterrence effects will likely differ as well. Although the cost-benefit calculation that leaders conduct may not be influenced by potential ICC punishment for violent crimes, leaders contemplating nonviolent crimes may be more deterred from committing them. The logic is as follows: because leaders whose goal is ethnic cleansing or genocide can achieve their goal no other way, they may be willing to pay the cost of going to jail or being killed in combat to achieve their goals (Drumbl 2007: 171). These types of international criminals often have ideological, not material, aims. Materialist crimes, however, may be more effectively deterred through the ICC because such leaders presumably steal for the luxury, power, and the lifestyle fabulous wealth allows. Sitting in a jail, even in The Hague, does not permit them to enjoy their plundered wealth and influence.

Leaders who have been brought before international tribunals for crimes of genocide (e.g., Milosevic in the Balkans or Bagosora in Rwanda) largely achieved their aims before being arrested. Despite explicit statements that the International Criminal Tribunal for the former Yugoslavia (ICTY) aimed at specific deterrence, the tribunal did not have sufficient deterrent effect (ICTY 1996: para. 58; Mennecke 2007: 322). The ICTY's staff had been investigating cases for two years at the time

of the worst massacre of the Bosnian war, Srebrenica (1995), and for five years during the 1998 ethnic cleansing in Kosovo (Rodman 2006: 40; Drumbl 2007: 169; Snyder and Vinjamuri 2003/4: 20-24). Deterrence, here, did not work, or at least did not work well enough. This is not to argue that deterrence in general is ineffective for violent crimes, but only to argue it is likely to be more effective for those who consider committing international non-violent crimes. The ICC will not be as an effective deterrent as it could be for either type of crime until it can arrest and prosecute everyone it chooses. That it lacks a police force means that international criminals like Sudan's Bashir can continue ruling and traveling to certain countries (such as Kenya) freely.

The paradox of punishing kleptocratic crimes.

Counterintuitively, I suggest punishment should be similar for crimes of omission and commission, as well as for violent and non-violent crimes with similar outcomes. This opposes the commonsense notion that the severity of punishment should correspond with the severity of crime committed (see Drumbl 2007). Three axes along which punishment can be meted out deserve consideration. One concerns intent, another compares violent to non-violent crimes, and a third involves the peace versus punishment tradeoff.²⁰

The discussion of intent here differs from the discussion above because here intent is used to determine severity of punishment, rather than to discuss the binary

²⁰ The latter is normally categorized as a peace versus justice tradeoff, but for a number of reasons this mischaracterizes the second half of the debate, concerning justice or punishment. It is far from clear that the domestic analogy of equating punishment with justice can be translated to the international realm, especially for the vast crimes discussed here. Punishment, in other words, is often insufficient for justice, internationally. This is a claim I cannot defend here and will have to leave for a later date.

categorization of criminal and non-criminal acts. Intent is widely considered important in determining the extent of criminal or moral culpability, and hence degree of deserved punishment. For the worst crimes that are not intended, just as for the worst crimes that are not violent, whether intended or not, the harms may be so severe and widespread that the limits of justifiable punishment are reached. For example, should one really receive less jail time if that person only orchestrated the killing of 1,000 people, compared to someone who killed 10,000? Should someone who, by stealing funds that would have nourished 1,000 people, causes them to starve to death, receive a lesser jail sentence than someone who through theft caused 10,000 to starve? Our common assumptions, in other words, may break down at the large scale, though just where the cut off is for severity of punishment would require another paper, or book.²¹ Note that this allows for the common assumption that one may be more *morally* at fault if one commits, as opposed to fails to prevent, a wrong. The problem is that normal methods of punishment conflict with the upper limits of what individual punishment can justly entail, especially regarding incarceration time.²² I am not arguing that all international criminals should receive the maximum punishment possible; punishment may need to vary according to rank.

This argument opposes the former discussion regarding deterrence.

Deterrence is normally thought to work in degrees: The harsher the punishment, the more likely the threat of punishment will deter. If punishment is not increasingly

²¹ For a related, but different, argument about individual morality, see Fishkin (1982).

²² There are other, harsher methods of punishment that have been and still are used, such as torture, but I accept that there are limits to justifiable punishment. In other words, there are only a limited number of human rights that can be forfeited or overridden, even if the perpetrator of the crime respected none.

severe attendant to the crime committed, there are no incentives to commit lesser crimes. Thus the incentive system of maximal punishment would only work to prevent international crimes from being committed at all, not by leaders moderating their criminality to lessen their sentence. Where does this leave us?

Still one further thorny issue is how to decide if international criminal law should be applied uniformly, as is the ideal of domestic law. Should similar crimes be treated alike, or should the potential cost of punishment –igniting a civil war, killing for revenge, or other, worse, harms—be considered? This is far too large of a subject for this chapter, but one that has rightly received detailed examination, and one that, given my argument here, would need to be at least reconsidered (e.g. Branch 2007).

V. Objections

Unintended perverse incentives.

Effecting such a change in the ICC's strategy might create its own perverse incentives, such as making current autocrats clutch power ever more tenaciously and ruthlessly. They may reason they have everything to lose if they fall from power, and more killing or looting would not subject them to any greater punishment. This may be the case, but because ruthless leaders have little or no moral qualms about brutal techniques and because they already have strong incentives to remain in power, the marginal incentive will be negligible. I do not advocate *fiat iustitia, et pereat mundus*; elsewhere I discuss when and when not the ICC should indict and prosecute. My point simply is that is that the ICC should consider the possibility of

making a situation worse if criminals calculate they have little left to lose after they are indicted for nonviolent crimes against humanity.

Another perverse incentive is that the ICC's power may be applied poorly, as Branch (2006) argues is the case for the ICC's first ever arrest warrants for Uganda's Lord's Resistance Army (LRA) commanders. Branch suggests the ICC's arrest warrants were detrimental to the peace process, possibly even contrary to international law, because it is not at all clear that Uganda's government was either unable or unwilling to try the LRA leadership. The ICC tacitly exonerated the Ugandan government's actions, which might committed abuses punishable under the Rome Statute. First, note that this objection applies not only to my argument, but to the ICC more generally, and perhaps even to domestic courts and prosecutors. I see no way around this objection, and perhaps the best we can hope for is a prosecution team that is politically astute.

These unintended perverse incentives may, in fact, be the case for those crimes committed after the ICC came into being (July 1, 2002), but they do not outweigh the possible good from implementing my suggestion. Moreover, this will limit clever political leaders from shifting strategies to avoid ICC prosecution, e.g. from militarily destroying a group of people to starving them to death.

Diluting Crimes against humanity.

Because the concept of a crime against humanity, both in language and meaning, is such a serious claim, some may believe that expanding its legal or moral scope must necessarily, and problematically, dilute it. I do not think this is the case for two reasons. First, theoretically I see no reason why property or

mismanagement crimes that result in widespread or systematic harms are any less severe than violent crimes; indeed the suffering may be even more severe. Imagine someone who has led a relatively healthy life, with adequate opportunity, a fine education, and so on until they were murdered or expelled from their home, say in ethnic cleansing in the Balkans. I see no reason why that person suffered more than someone in Chad who had poor health most of her life, who was malnourished, and who finally succumbed to a treatable disease because malnutrition attributable to kleptocratic governance weakened her immune system.

I do not want or need to claim one scenario is worse than the other, but only want to suggest that the latter death is sufficiently morally abhorrent to qualify as a crime against humanity as defined by the Rome Statute. Second, if someone wants to term the crime something different and objects to the language of the Rome Statute, I would actually agree: the category of crimes against humanity is theoretically suspect at best. I do not have space to develop this argument, but I will briefly note a key point Altman (2006) makes in an article titled “The Persistent Fiction of Harm to Humanity.” He writes, “The vital interests of most humans are simply not at stake” when crimes against humanity are committed (Altman 2006: 371). The concept of harm has to be stretched beyond useful meaning to support the theoretical, as opposed to legal, concept of crime against humanity (see May 2005, 2006, 2006a; Luban 2004, 2006; Mayerfeld 2006; Vernon 2002).

The ICC is itself not accountable.

There is a deep dilemma at the heart of the ICC: the ICC is only necessary when states are unable or unwilling to bring perpetrators to account, and by design

the ICC is not accountable to any single government. A purportedly powerful institution that is undemocratic and unaccountable to state governments is dangerous, just as not being globally accountable is dangerous. John Bolton used this argument in an attempt to derail realization of the ICC (Paris 2009: 61 and *passim*). Might not the ICC abuse its power for political ends? The question might be framed, to borrow Rubenstein's (2007) language, as: who can hold the surrogate accountability holders to account?

There are a few responses to this question. First, note that this is not only an objection to my argument, but to the entire structure and jurisdiction of the ICC. Second, consider the alternatives. Being more directly accountable to state governments would make the court highly political, and would not eliminate the criticism of problematic accountability. Look to the critics of the UN, the IMF, the World Bank, or the WTO for objections to this sort of accountability. Finally, consider the arguments of the Federalists, among others, who suggest that judicial independence is important for fair trials and the rule of law. International judicial independence, and its domestic parallel, are far from perfect, but it is a better solution than any alternative.

Pogge's explanatory nationalist critique.

Perhaps a final objection is that only holding to account national and nonstate actors is incomplete, leaving out those who implement and sustain the international economic and political order and who perhaps might also be morally or legally liable (Pogge 2008). Recall the difference in property rights between what

developed democracies employ domestically and the property rights regimes countenanced internationally (Section III. 2.). Pogge might suggest that my analysis is overly nationalistic, and does not sufficiently consider international actors. For example, perhaps the ICC should focus its jurisdiction on international actions and regimes, or that reforms should be focused instead on the global institutional order, and not country-level problems. I accept that the global institutional order, especially concerning the property rights regime, is problematic and needs modification. Perhaps international actors should be tried for crimes against humanity as well: The UN-imposed and US-backed sanctions against Iraq in the 1990s led to perhaps 500,000 deaths—the US even blocked the export of child vaccines to Iraq (Gordon 2006: 87, 83, respectively). But this is neither an argument against mine, nor does it obviate the need to try state and non-state actors that act terribly. It is an argument for further expanding the scope of international criminal law.

VI. Conclusion

The form of global accountability advanced here does not distinguish between democratic and non-democratic regimes. Holding both to higher global accountability is advantageous because both have incentives for criminally bad governance, although the incentives are different. Notice that I did not argue that the type of expanded accountability proposed in this chapter should be the only type of accountability, or that the incentives proposed be the only type of incentives (Grant 2006). Indeed, only with a multipronged approach that carefully assesses

every case and minimizes adverse externalities can the broad goals of achieving better global accountability and preventing wide-scale and serious harms be realized. That said, the ICC should urgently investigate and indict some of the world's worst governing actors, even given the ICC's limited resources. At once signaling its intent to use its full legal mandate to deter potential perpetrators, the ICC would at the same time bolster its legitimacy by investigating leaders who are widely considered horrific by the international community. Nonviolent harms remain a daily affliction for too many.

Chapter 4

To Indict or Not to Indict? The ICC, Deterrence, and Nonviolent and Subordinate International Criminals

Introduction

When and for what reasons should the ICC investigate and indict an alleged international criminal? The ICC's first prosecutor, Luis Moreno-Ocampo, has argued that the "preliminary recommendation [is] that *in cases of alleged crimes occurring on a massive scale, the Office of the Chief Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility*" (Ocampo 2003: 6, emphasis in the original; see also Schabas 2007: 32-6). Ocampo implies that everyone who violates the law of the Rome Statute, the foundational document of the ICC, should be prosecuted, and that if resources are scarce, the worst of the worst should be given priority. Is this the best strategy? How should we make this judgment? I argue that Ocampo's policy of pursuing the most

reprehensible international criminals, without regard to other issues that could improve the deterrence capabilities of the Court, is misguided.

I suggest instead that protecting human rights mostly through a strategy of general deterrence should be the goal of the ICC's prosecutor. Increasing deterrence is possible by prosecuting (a) nonviolent violators of the Rome Statute as well as (b) those in secondary positions of power who are necessary to carry out violent as well as nonviolent international crimes. Some nonviolent criminals are deterrable because they pilfer state funds for personal enrichment, and may be more risk adverse than violent criminals, since nonviolent crimes have traditionally not attracted military intervention. Those in secondary positions of power may be acting for instrumental and hence deterrable purposes even if their superiors commit international crimes for non-instrumental purposes, such as some cases of genocide. These methods of promoting deterrence are meant to supplement, not supplant, prosecuting the highest-level violent international criminals. Prosecuting violent international criminals at the pinnacles of power can be justified on grounds of deterrence and partial retribution. Below I will discuss why I say *partial* retribution.

I acknowledge that not all international criminals are deterrable. International criminals already face high risks, meaning that the additional cost of ICC prosecution is small or negligible. Furthermore, some international criminals are not deterrable because they may commit crimes as ends in themselves, rendering their calculus immune to the cost-benefit logic of deterrence. My argument is that changing prosecution strategies will deter only some international

criminals, but that this is the best we can hope for from the ICC. There is some evidence that supports the hypothesis that prosecuting human rights violators decreases prospective human rights violations (Kim and Sikkink 2010). Yet because the ICC has been in force only since July 1, 2002, and never before has there been a permanent international criminal court, we must assess the possibility and probability of deterrence mostly from evidence from domestic courts and ad-hoc tribunals.

In making an argument for deterrence, I do not want to overstate the ICC's importance or power. The ICC's power to deter is constrained because it lacks any sort of police or military force to carry out its arrest warrants. Although it is the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes," this duty itself is subject to the same problem of lacking enforcement powers (Rome Statute 1998: Preamble). As Hobbes would put it, the ICC "covenant" is "without the sword, [is] but words" (1651: Chapter 17, para 2). Is Hobbes right? Is the ICC nothing more than a waste of people's time and money, nothing but worthless words on paper? Although the sword is dull, some states still discharge their duty to enforce the ICC's law. Alleged international criminals *do* sit behind bars and their trials are ongoing in The Hague. But for some, the Rome Statue is "but words" since some states shirk their duties. In August 2010, for instance, Kenya paradoxically hosted Sudan's president Omar al Bashir, the infamous international pariah charged with all three of the ICC's current core crimes, at the opening ceremony of their new constitution that was supposed to usher in a stronger rule of law (Cowell 2010). Because the deterrent capabilities of the ICC are

limited, other methods of protecting human rights such as humanitarian intervention or targeted economic sanctions will still be required in some cases to prevent or halt ongoing international crimes. I discuss below how the ICC can and should coordinate with these other actors.

Despite my emphasis on deterrence, and despite that effective deterrence requires consistent prosecution, in some cases protecting human rights in the short term may outweigh the long-term goal of deterrence. Permitting types of justice and recovery mechanisms other than criminal trials (that may include amnesties, pardons, or other inducements) is important because not allowing these alternatives might create perverse incentives for powerful individuals. To hang onto power by any means possible in order to avoid prosecution and punishment, these leaders might commit additional human rights abuses. Decisions regarding when not to prosecute but to allow these other methods of dealing with international crimes can only be made on a case by case basis. I suggest that those making a case for amnesties, pardons, or the like, carry the burden of proof. The default position should be for prosecution.

Adam Branch discusses one example of these possibly problematic incentives related to the ICC's indictment of the leadership of the Lord's Resistance Army's (LRA) (Branch 2007). He suggests that the ICC's indictment of some of the LRA leadership created disincentives for them to lay down arms (Branch 2007). The LRA is a horrific group that marauds, mutilates, murders, rapes, forcibly drafts child soldiers in northern Uganda, Central African Republic (CAR), Democratic Republic of Congo (DRC), and what is now South Sudan. Despite the indictments, LRA started

negotiations. We cannot know exactly why the LRA entered into these negotiations, but some such as Leslie Vinjamuri, suggest it may have been because they were weakened militarily (Vinjamuri 2010: 201). The talks failed, and the LRA resumed its horrific habits (HRW 2010).²³ If Branch is right – and of course making counterfactual judgments are inherently fraught with controversy and uncertainty – then perhaps the ICC should be more selective in its indictments.

Some might object that asking who the ICC should indict risks appearing pointless, even pernicious, because according to a foundational principle of the rule of law, everyone who is reasonably believed to have violated a criminal law should be treated equally, and investigated, tried, and, if guilty, punished. Yet this selective prosecution is exactly what the ICC is now doing. Currently the ICC excludes nonviolent criminals and mostly excludes subordinates from prosecution. This selective prosecution undermines deterrence, putting the lives of many at unnecessary risk. My argument expands the pool of who should be tried by the ICC. Thus, although my arguments do not rely on a fairness argument often espoused by rule of law proponents, they move the ICC closer to applying the rule of (international criminal) law. Given the hallowed position the rule of law has domestically, one might wonder whether the founders of the Rome Statute endowed the ICC's prosecutor with such power to decide who and who not to prosecute. Does the office carry such a power?

²³ Another, separate, criticism of the ICC's policy is that it should have, but did not, indict some Ugandan government officials for the crimes they committed in pursuit of the LRA (Schabas 2007: 149).

Although just one person has the extraordinarily difficult job of weighing such arguments and deciding which individuals to pursue, three actors can trigger the ICC's jurisdiction (Schabas 2007: chapter 4). State parties to the Rome Statute and UN Security Council (UNSC) can refer cases to the ICC, or the powerful prosecutor, *proprio motu* (on one's own volition), can initiate an investigation. The prosecutor, however, retains the sole authority to decide which of the cases referred to her, or initiated by her, should be investigated or discarded. She is thus a pivotal actor for our purposes. For this reason I focus primarily although not exclusively on the strategy the prosecutor should choose. The three actors currently have jurisdiction over violations of any of three core crimes in the Rome Statute, including genocide, crimes against humanity, and war crimes. Starting in 2017, the Rome Statute will expand to include the fourth crime, aggression, which was for the first time ever defined in a permanent international criminal court in 2010 (Scheffer 2010). The UNSC has the unique power to refer anyone to the ICC; state parties can only refer, and the prosecutor can only open investigations of, nationals of countries that have ratified the Rome Statute or individuals who committed an alleged crime in a country that has ratified the Rome Statute. Unlike the situation in domestic law, in which prosecutors are generally required to prosecute anything above a *de minimus* violation of the law, the Rome Statute (Article 15; Schabas 2007: 159) granted the ICC's prosecutor the power of deciding when to prosecute. Article 53((1)c.) empowers the prosecutor to not investigate possible crimes if the investigation would not "serve the interests of justice" taking into account the

“interests of victims.” Since both of these interests are undefined, this clause deposits a great deal of power with the prosecutor.

I proceed as follows. First, I discuss the three leading and sometimes competing goals of international criminal law and argue that deterrence is the goal that the ICC should pursue. Second, I argue that because international criminals are rational and risk adverse to differing degrees, they will be differently deterrable. Even genocide, the crime within the ICC’s jurisdiction having the most stringent *mens rea* and thought by some to be committed for non-instrumental purposes, can be deterred by focusing on those subordinate criminals who do not possess the genocidal intent. Third, the ICC should focus more on nonviolent international criminals, a category the ICC has yet to seriously consider, as these individuals are often the most risk adverse and rational. Fourth, given the constraints and goals of the ICC, it should only press for domestic trials in those countries it judges as responsive to its pressure. Fifth, counterintuitively, sealed rather than open indictments are most likely to deter would-be international criminals; thus the ICC should issue open indictments only in cases where domestic prosecution is likely. I conclude by arguing that because the ICC has limited power, it should coordinate and lobby other institutions to both maximize its deterrence capabilities and protect innocents.

Three Justifications for ICL, More Than Three Possible Strategies for the ICC

As Eric Posner puts it, “the challenge facing international law scholars today is to explain how much of international relations can be successfully and

appropriately legalized, and how much cannot” (Posner 2009: 39). Scholars attempting to respond to this challenge fall into two broad camps. The first, which Drumbl calls “legal liberalism,” extrapolates domestic legal principles internationally, whereas the second holds that because international law is different than domestic law, we should look more to outcomes than to simply transferring domestic principles to the international sphere (Drumbl 2007: 5-6; Vinjamuri 2010). Liberal legalism holds that individuals are personally accountable, and not only do prosecutors have a right but they also generally have a duty to prosecute all violations of international criminal law. Vinjamuri terms this a “moral absolutist” position because it takes the principle of legality and ideally applies it everywhere to everyone, without regard to consequences for others (Vinjamuri 2010: 193). The second position, conversely, suggests that international law is different in kind from domestic law because, for instance, enforcement mechanisms are weaker or international prosecutions may undermine peace, democratic transitions, or reconciliation between hostile groups. This second position challenges “the fundamental principle that law should be independent of politics” (Vinjamuri 2010: 203). Scholars in this second camp hold that because international criminal law cannot be independent of politics or policy, practitioners must treat it as a hybrid, balancing legal principles with real-world outcomes. My argument fits within the latter school of thought, but at the same time promotes an aspect of the former by suggesting that the ICC should indict more categories of individuals than it currently does.

These competing arguments about the proper place and extent of ICL map closely onto competing justifications for ICL. The rule of law or moral absolutist position is aligned with retributive justification, whereas the consequence-based justification is associated with deterrence. In what follows, I discuss three justifications for criminal law including retribution, expressivism, and deterrence, and discuss some of the ways these domestic justifications can map onto the ICL of the ICC (Drumbl 2007: Chapters 1, 6). I draw on Drumbl's important contributions, but disagree with him that "expressivism has greater viability than deterrence or retribution as a basis for a penology of extraordinary international crime" (Drumbl 2007: 17). Instead, I argue that deterrence is the most important but not the exclusive goal that should guide the ICC's prosecutorial strategy.

These justifications are important because the Court's prosecutor will adopt different strategies depending on which justification or combination of justifications for ICL she takes to be paramount. For instance, if retribution is the primary goal, the worst of the worst should be given prosecutorial priority, as Ocampo argues. If expressivism is the goal, then the prosecutor should choose cases that will be example setters, receive maximum publicity, and work with media and educational institutions to ensure individuals learn the historical record of the criminal punishment. This may seem like deterrence would also suggest these policies and this is partially true, but expressivism has the primary goal of setting the historical record straight and using the law to publically condemn international crime. Deterrence may be more effective if these policies were enacted, but deterrence has higher priorities such as consistently and quickly arresting alleged perpetrators. As

this discussion shows, there is overlap between some of the policies that various justifications for ICL suggest. Although I argue that deterrence should be the primary aim of the ICC, in the process expressivism and retribution will be achieved in part.

Retribution

Retribution is the “dominant” justification for punishing international criminals, Mark Drumbl claims (Drumbl 2007: 150). Although there are a number of ways of justifying retribution, the rationale is based primarily on desert: a criminal, precisely because she has broken the law and presumably harmed at least one other person, deserves some form of punishment (Drumbl 2007: 150; Boonin 2008: Chapter 3). Another common way of phrasing this is that when a criminal is punished, a type of justice, specifically retributive justice, is achieved. Unlike deterrence, retribution is not consequentialist and retrospective, punishing someone for what he did in the past. Because of past wrongs, a theory of retribution holds, an individual’s life should be made difficult and uncomfortable in any number of ways, including but not limited to, coercive incarceration and reparation. A significant difference between deterrence and retribution is that retribution does not depend on the rationality of actors to achieve its goal. This applies to both the individual criminal and to others. For retribution to be effective, it matters little how others respond to the perpetrator’s punishment. Retribution focuses more on the individual than does deterrence. However, retribution is not aimed solely at the

individual, as retributive punishment may be one of the victims' demands (see Philpott 2009).

However deserving international criminals are of punishment, ordinary punishment can never adequately mete out retribution proportional to international crimes (Drumbl 2007: 150 and Chapter 1). Because of this, I suggest, retribution should not be the primary goal of the ICC's prosecutorial strategy. The reason why proportional retribution is impossible for international crimes, according to Drumbl, is an extension of the principle of proportionality in punishment (see Drumbl 2007: Chapter 1). The reasoning is as follows. Punishment, to be fair, should be proportionate to a crime's severity. For instance, because an armed robbery is less severe than a murder, a guilty armed robber deserves a less severe punishment than does a guilty murderer. Because the crimes in the Rome Statute are the worst possible, criminals deserve the severest punishment that still respects their human rights (forbidding, for example, torture as punishment). The limits of proportional retribution, however, are quickly reached for large-scale international crimes. For murder in the first degree, someone can often receive life imprisonment. Forbidden from imposing the death penalty (Article 77), the ICC can impose as the severest punishment life imprisonment. The same punishment cannot be proportionate for someone who murders one person and someone who commits any of the crimes over which the ICC has jurisdiction, because of the vast numbers of people severely harmed by anyone found guilty any of the ICC's crimes.

Someone might reply that retribution could be proportional if each victim viewed the crime committed against him or her individually, and that the criminal's

punishment was only for this one crime. Instead of viewing a crime against humanity, say, as itself a punishable offense of the severest degree, the victims and the rest of the world could view a perpetrator's punishment as multiple dyadic individual crimes and the punishment as appropriate for each individual crime. This purposefully and problematically ignores two important points. First, the international criminal perpetrated crimes against many individuals, and it is unclear why, if typical individual punishments are roughly appropriate, the same punishment as the domestic criminal can be proportionate. Second, some believe that international crimes also constitute a crime against society so that the aggregation of the individual crimes should be regarded as not merely a summation of the individual crimes, but perhaps a multiplication. A community in which one or several members are murdered is scarred in one way, but a community in which the vast majority are forced from their homes, raped, murdered or otherwise wronged, is injured in a way that is different in kind. There is a before and an after, an irreversible mark in time, and generations to come will learn of and have to grapple with what their forbearers did – and what they did not. As angry and upset as we may be at the masterminds of international crimes, no humane retributive options are available to us to adequately and proportionately punish them.

Some might suggest that retribution does not have to be proportional. I agree that it does not follow that because we cannot realize proportionate retribution that we should seek no retribution at all for extraordinary crimes. But I am not sure why retribution should not attempt to be proportionate. Fairness requires legal systems eschew overly harsh or light punishments. My argument suggests that we should

generally seek the harshest acceptable punishments for international criminals even though this punishment cannot hope to be proportionate to the crimes. Any lesser punishment would be that much more disproportionate. But this argument does not decisively trump other possible justifications for ICC strategies, even if it provides one strong reason why the ICC should generally punish perpetrators as severely as it can. The impossibility of full retribution, however, suggests that another justification should supplement it.

Expressivism

A second justification for international criminal law is known as “expressivism.” It justifies the law by using it to express the norms of society, condemn the crime, record the facts of the case, and to “strengthen faith in the rule of law among the general public” (Drumbl 2007: 173-80, quote from 61). Expressivism is aimed at both the individual and the society. Individually, punishment is justified by expressing a society’s condemnation of a criminal’s actions. This is more than a strictly retributive justification because retribution is merely aimed at making one suffer for one’s actions in order to restore a moral balance. Socially, expressivism is justified by providing an alternative narrative to the ones offered by “conflict entrepreneurs” or organizers of genocide, for example, who often demonize and dehumanize their victims before committing their crimes (Drumbl 2007: 174. Power 2002. Hiebert 2010). Rather than depending on the self-interested rationality of deterrence, expressivism appeals to others’ moral sensibilities and desires to divulge history. By imprinting the facts of a case in the

annals of history for all subsequent generations to know, Drumbl claims, expressivism appeals to victims' wishes for a permanent record so that none can plausibly claim that some event did not take place (Drumbl 2007: 174-6). Through divulging the truth (ibid.), expressivism may thus play an important role in rebuilding societies after mass atrocities through truth and reconciliations commissions. Though for different reasons than deterrence and retribution, expressivism is both forward and backward looking because it makes past facts available to all in hopes that the society, by learning of past wrongs, can rebuild.

While expressivism is undoubtedly important, we should demand more from the ICC than just the realization of expressivism. There are other ways of expressing condemnation, as political, religious, and moral authorities habitually do through their speeches, sermons, writings, actions, and interviews. It is not at all clear that an international criminal trial, rather than a truth and reconciliation commission, such as South Africa's, is a better tool to accomplish the extraction and promulgation of historical fact. To convict, the prosecutor only has to meet the minimal requirements to prove guilt and need not present anywhere near a complete historical account. Because of budgetary and time constraints, the prosecutor often has to exclude testimony that she would otherwise have included (Armatta 2010). Although criminal trials can contribute to each of the goals of expressivism, the ICC can achieve only a part of expressivists' goals, just as retribution can only partially succeed. What is more, even if the ICC could achieve each of these goals, many would be disappointed if this were all we could hope to achieve from the ICC. Victims and nonvictims alike pine for more than mere condemnation and a rich historical

account, of past wrongs. Do we have any realistic hope of the ICC deterring potential international criminals?

Deterrence

Deterrence is an instrumental, society-wide, future-oriented aim of criminal law. Deterrence attempts primarily to prevent others from committing crimes through the threat of punishment (Boonin 2008: Chapter 2). It assumes that people are to some degree rational, i.e., they respond to incentives, and that if the cost of committing a crime outweighs its benefits, fewer people will commit a crime. Often punishment is assumed to be only *ex post*, but deterrence is the one way punishment can at once be *ex post* for some and *ex ante* for others (Glendon 2001: xvi). Consequentialist in justification, proponents of deterrence argue that a central aim of criminal law should be preventing would-be criminals from committing crimes. If prevention were possible without undue costs to individual liberty, it would be an ideal outcome of criminal law.²⁴ Because international crimes are so severe and the punishment should be similarly harsh, the concern that deterrence treats individuals as mere means to change the actions of others does not hold as much weight here as it does for justifications pertaining to typical domestic crimes.

I want to note at the outset a potentially debilitating methodological difficulty that plagues deterrence theory. Attributing nonevents to deterrence is

²⁴ However, if taken to an extreme, deterrence could open interesting although morally questionable liability standards, such as those that would hold bystanders to some extent criminally liable (Drumbl 2007: 173). This would go against theories of individual criminal responsibility that generally view actions but not inactions as potential criminal liabilities in domestic and international criminal law. But such an argument may be more likely to attract those who favor deterrence as a justification for punishment because including more people and holding them to a more strict standard of criminal liability could help deter (Ibid.).

problematic at best. Rare is the clumsy international criminal who would declare to the world that she decided against committing a crime because of penalties. An actor could choose to not do something for any number of reasons, and it must remain in the realm of speculation for most cases why some people do not act criminally (Mennecke 2007: 324). Deterrence can work in another way that is similarly difficult to measure. It can change the type or severity of the crime committed, but for the same reasons it would be next to impossible to enumerate these events with any degree of certainty (Drumbl 2007: 169). Because of these difficulties, the argument I present in this chapter relies on a rational choice analysis and remains vulnerable to criticisms against that approach (Green and Shapiro 1994). Speciously imputing causation from correlation is a central worry of social scientists, but it applies to all theories and is not unique to deterrence theory.

That said, deterrence is typically broken down into two broad categories, general and specific (Drumbl 2007: 169). *General* deterrence uses the example of punishing the guilty to discourage potential criminals from committing crimes. *Specific* deterrence refers to creating disincentives to prevent individual recidivism. Punishment, the theory goes, should be severe enough to teach criminals that the cost of committing crimes outweigh the benefits. Are both types possible? Not for the ICC. Specific deterrence suffers from the same impossibility problem that retributive justice does for extraordinary crime. If someone kills 10,000 people, but then decides not to kill another 10,000, should that person have their sentence cut in half, or cut by any amount? Someone who commits such horrendous crimes deserves the harshest possible sentence. Another problem is that proving someone

was planning an international crime and then was deterred from carrying it out is next to impossible. Anyone could falsely make such a claim. Empirical evidence undermines a specific deterrence strategy as well. Once indicted, international criminals often continue with their ghastly policies. The UNSC created the ICTY in the early years of Milosevic's wars, but he went on to commit genocide, war crimes, and crimes against humanity. Bashir continued his atrocities in Darfur and elsewhere after his indictment, displacing 40,000 civilians in January 2011 alone (Hamilton 2011). Despite an ICC arrest warrant for him, Kony continues to rampage around the Ugandan-Sudanese-DRC border region (Branch 2007; HRW 2010). Many of the arguments in this paragraph should be decisive in themselves, but taken together they point to *general* deterrence as the only type of deterrence that is possible and prudent for the ICC to pursue.

For either type of deterrence to work, several components of the law, and several characteristics of potential criminals, are required (Hiebert 2010: 3, 10-11). First, the law must be widely known and understood. If the law is unknown, or is unclear to any reasonable person without the aid of counsel, it could not have a general deterrent effect since no one could know which actions were criminal and which were not. Second, punishment must be swiftly applied; if a criminal knows that punishment will likely be deferred, the effectiveness of deterrence decreases. Third, punishment must be certain. If only two percent of criminals are ever arrested, prosecuted, and jailed, other criminals would assume that they can likely escape any sort of sanction. Fourth, punishment must be consistent. If one convicted murderer receives life imprisonment and another merely probation for one year,

the disincentive that potential murders face, significantly decreases. Finally, deterrence will work only when the cost of the likely punishment outweighs the likely benefit from the crime. To make such calculations, the criminal must be rational to some minimal degree. As Richard Goldstone, a former chief prosecutor for the ICTR and ICTY writes, “the ability of any system to deter, whether national or international, is restricted by the extent to which perpetrators might be rational or non-rational actors” (Goldstone 2010: 67n17).

I define an actor as rational if she selects means that will efficiently move her toward her chosen goal, and I assume her goal is to maintain or maximize her material interests. Not all people act only for even primarily in this way, I acknowledge. I rely on this assumption because at least high level politicians and leaders often choose to maximize wealth or power or both given the limited information and limited options they have (e.g., Bueno de Mesquita et. al. 2003: 9-10). A rational choice model may be more fitting for high level leaders than for the average individual (Geddes 2003: 184). This holds even for the subordinates who wield merely great and not supreme power. As Elinor Ostrom says, in certain situations, assuming “rational behavior focusing on material outcomes has been shown to be a powerful engine of prediction” (Ostrom 2005: 99). Some rational choice theorists allow for alternative ends (Geddes 2003: 179). Yet circumscribing “rational” in the way I suggest is acceptable for the purposes at hand because it provides a way to compare whether individuals may be deterrable by criminal sanction and because I discuss a few cases in more detail to test whether the rational choice assumption holds.

Criminals can commit crimes for either instrumental or intrinsic purposes, the former of which are typically more easily deterrable. Consider the following. Seeking wealth by criminal means may be deterrable because if a criminal is caught he will not be able to enjoy his plundered resources. Other legal options are available to obtain wealth, even if the profits will likely not be as substantial. But because exterminating a group of people can be achieved in no other way, it *may* not be deterrable. I emphasize “may” because some who commit crimes of the latter category are deterrable since they commit the crime for rational reasons. But if one’s goal is to commit an international crime, and one is willing to pay a high price to do so, it can be achieved in no other way and is therefore unlikely to be deterrable. Even some small percentage of criminals who commit crimes for intrinsic purposes may be deterrable if they do not desire their goals so fervently to be willing to pay any price to achieve them.

One objection that we should clear out of the way before even attempting to construct such a theory of when and why the prosecutor should indict, is that it is impossible to actually know what motivates and drives individuals to commit – or refrain from committing – international crimes. Put another way, because we can never accurately know an individual’s goals, if rationality is defined as acting to reach one’s goals, we can never actually know whether anyone is rational (Green and Shapiro 1994). If people are not rational, then deterrence cannot work. This is a deep epistemological issue that I can discuss only cursorily here. All we can do is impute motives from actions and words. There are a few responses to this objection. First, because of modern technology, we have a wealth of spoken and written

documentary evidence, both public and private, from leaders. Based on this evidence we can construct a blurry yet plausible picture of what motivates an individual. Second, part of what matters for deterrence is perception. Even if the prosecutor arrests and tries alleged international criminals who seem rational but who actually are not, some future criminals may be deterred. Third, and most importantly, we have empirical evidence to suggest that at least some criminals are rational in the sense that they respond to incentives, the evidence for which I next discuss.

Although in the past scholars found little evidence for general deterrence from international criminal law (Drumbl 2007: 169; Mennecke 2007: 323; Snyder and Vinjamuri 2003/4), some recent work of Hunjoon Kim and Kathryn Sikkink suggests prosecutions may in fact deter some (Kim and Sikkink 2010). Using a new dataset, Kim and Sikkink find evidence to support the hypothesis that increases in prosecutions decrease prospective security rights violations (Kim and Sikkink 2010). As the number of prosecutions for human rights violations increases in countries transitioning from one type of political regime to another, the likelihood of security rights violations in the future decreases (Kim and Sikkink 2010: 941, 951-58).²⁵ Persuasive as Kim and Sikkink's work is, we should be cautious in treating it as definitive. In another recent study, James Meernik, Angela Nichols, and Kimi King (2010) use data between 1982 and 2007 to test whether criminal prosecutions decrease or increase the chances of a reemergence of civil war and further human

²⁵ Contrary to the "peace versus justice" tradeoff, which holds that prosecutions and threats of prosecutions may cause more violence because the threat of prosecution incentivizes the powerful defendants to avoid arrest by any means possible, deterrence works even during ongoing civil wars (Kim and Sikkink 2010: 955-6).

rights violations. They find that prosecutions have no positive or negative effect on the chances of civil war or prospective human rights violations. Nonetheless, Kim and Sikkink's finding may be more convincing and useful for the following reason. They use a dataset that extends a nearly a decade further back than Meernik, Nichols, and King (2010) do, and Kim and Sikkink include more types of states than just those emerging from civil war, thereby making their findings more relevant for our purposes. In the next section, I show that international criminals may be rational and hence deterrable to different degrees, but that even if the most powerful international criminal is irrational, the crime may be deterrable by focusing on their rational subordinates.

Genocide, Rationality, and Deterring Subordinates

Because genocide may be the most difficult crime to deter, I use cases of genocide, among others, to build my argument. Hence if my argument works for genocide, it should apply to each of the other core crimes too. Genocide is the most challenging international crime because some believe that, by definition, *genocidaires* cannot be rational and hence not deterrable. The argument runs as follows: *all* instances of genocide must, by definition, be expressive and none can be instrumental because the *mens rea* of genocide, special intent, is a necessary part of the crime (Rome Statute 1998: Article 6; Schabas 2007: 94; Lee 2010). The special intent to destroy in whole or in part a "national, ethnical, racial or religious group, *as such*," makes genocide distinct from the other crimes in the Rome Statute because it requires the intent to not only harm or kill but also the intent to do so *because of an*

individual's or group's identity. Although targeting people because of their identity is a necessary condition to commit genocide, targeting people based on only some identities can make one guilty of genocide according to the ICC's (and the Genocide Convention's) definition of genocide. For instance, one may be committing other international crimes but it cannot be genocide if one targets people because of their political views, gender, class, or education level (Rome Statute 1998: Article 6, emphasis added; May 2010: chapters 3, 7-8).

The logical error of the argument that genocide can only be expressive is that committing an expressive crime need not be mutually exclusive with committing an instrumental one. Genocide's unique *mens rea* does not exclude its instrumental use. A leader can intend to target a relevant group to destroy it as such, but do so for rational reasons. For instance, one can commit genocide in order to remain in power, fan hatred, or expropriate territory. Some of the leading conflict and genocide scholars concur. For example, Stuart Kaufman claims "the most popular approach [to explaining war] today is based on rational choice theory, which incorporates some realist ideas of the security dilemma into an explanation that insists on the rationality of even such extreme behavior as genocide" (Kaufman 2006: 45-6). As Fearon and Laitin put it, "if there is a dominant or most common narrative in the [six] texts under review, it is that large-scale ethnic violence is provoked by elites seeking to gain, maintain, or increase their hold on political power" (Fearon and Laitin 2000: 846). I show that leaders differ in their degree of rationality and that genocidal leaders can indeed be rational. From the least to most rational, I use three

cases to make this point. The cases I use are the 1994 Rwandan genocide, the Ugandan based LRA, and the Balkans in the 1990s.

Whether the leaders of the Rwandan genocide were rational remains controversial. Alison des Forges, perhaps the most well respected American scholar on Rwanda until her unfortunate 2009 death in a plane crash near Buffalo, NY, wrote that the Rwandan genocide was a “deliberate choice of a modern elite to foster hatred and fear to keep itself in power...They believed that the extermination campaign would restore the solidarity of the Hutu under their leadership” (des Forges 1999: Introduction). On des Forges’s account, they had the necessary intent to destroy in whole or in part, but their intent was instrumental. At the time of the genocide, the Rwandese Patriotic Front (RPF) was threatening the ruling regime through an invasion launched from southern Uganda. The Hutu Power elites, des Forges argues, thought that genocide was the surest way unite their base and hang onto power. Others disagree. Kaufman, for instance, argues that if the Hutu Power government wanted to remain in office, it would have been more rational for them to concentrate on defeating the RPF rather than organizing paramilitaries across Rwanda to kill, rape, and harm Tutsis (Kaufman 2006: 80). Within a few months of the start of the genocide, the RPF drove the Hutu Power government from power and into the eastern DRC. A third interpretation allows both des Forges and Kaufman to be correct. Des Forges could be right that the Hutu Power government *thought* that genocide would be the surest way to build anti-RPF support and action, but that they were mistaken. Perhaps they would have been more rational to have done what Kaufman suggests if they wanted to maintain power, namely, organize

Hutus not to commit genocide but to defeat the RPF. Still, from the evidence we have, it is not clear that the *genocidaires* were rational in the sense of wanting to maintain power. The point here is to show that the Hutu Power government might have had genocide as their primary goal and may not have tried to use it instrumentally to remain in power. That is, the Rwandan elite may have not been rational in the sense of wanting to maintain power.

Just as there is a debate about the rationality of the Rwandans who orchestrated the genocide, Ugandan experts remain divided on whether Joseph Kony, the leader of the Lord's Resistance Army (LRA), is rational. Kony, a self-proclaimed spiritual leader purportedly intent on implementing the Ten Commandments, plunders, murders, and abducts child soldiers in northern Uganda and in neighboring states, but he may not have a clear political agenda (BBC 2003). For instance, Jeffrey Gettleman, the *New York Times* East Africa correspondent, uses the LRA as a paradigm of what he calls Africa's "un-wars," the leaders of which "don't have clear goals" (Gettleman 2010). It is not that Kony says one thing and does another that casts doubt on his rationality, as most political leaders (particularly those who fight wars) lie, but rather that he seems to lack a cohesive strategy. Although he has been characterized as illogical, I think the evidence suggests otherwise (Branch 2007: 182). Attempting to explain why some people call Kony irrational, Christopher Blattman and Jeannie Annan hypothesize that others have a "failure of imagination" because they cannot conceive that Kony rationally pursues his horrific strategy and goals (Blattman and Annan 2010: 155). One possible rational choice explanation is that Kony is acting to gain wealth, as

others do in eastern DRC by mining rare earth materials. But the “Acholi region [in northern Uganda], itself does not hold known strategic reserves of any key resources,” undercutting the argument that Kony is interested in wealth (van Acker 2004: 336). James Bevan proffers an interesting alternative when he argues that the people the LRA abducts are themselves the resource (Bevan 2007). On Bevan’s account, Kony is rational and is exploiting natural resources – only they are animate rather than inanimate. Bevan’s argument, however, fits more closely with the other main argument that rational choice theorists would offer, namely that Kony simply wants to hang onto (nonstate) power by whatever means available. Similarly, Blattman and Annan use data from interviews with former abductees to argue that the LRA are much more rational than some would believe (Blattman and Annan 2010). This option fits more closely with the facts, but it is still unclear why Kony would not try to maximize his power by, say, trying to overtake the state, or venture into the lucrative mining in eastern DRC. Perhaps the reason some have characterized the LRA as irrational, itself has a rational explanation, as Blattman and Annan hypothesize. Painting the LRA in such light serves the interests of journalists trying to gain exposure in the press, and of the Ugandan government to garner military aid (Blattman and Annan 2010: 155).

One of the most clearly rational international criminals is Slobodan Milosevic. The chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia and an expert on the horrific wars in the Balkans in the 1990s, Carla del Ponte believes that Milosevic committed genocide, war crimes, and crimes against

humanity for the singular instrumental purpose of maintaining power. Del Ponte claims that

everything with the accused Milosevic was an instrument in his service for his quest for power. One must not seek ideals underlying the acts of the accused. Beyond the nationalist pretext and the horror of ethnic cleansing, behind the grandiloquent rhetoric and the hackneyed phrases he used, the search for power is what motivated Slobodan Milosevic (as quoted in Armatta 2010: 13).

Here a widely respected expert on international law argues that leaders can commit genocide, among other international crimes, for instrumental and rational purposes.

Of the three cases (assuming the counterfactual that the ICC could have jurisdiction over each case), the ICC should focus on those second in command in each case as well as those at the height of power. This would ensure that even if the likes of des Forges and del Ponte are wrong that *genocidaires* can act instrumentally rationally, the ICC could still deter genocide. The ICC may be able to deter the second and third rank individuals who may be instrumentally motivated. Neither the 1948 Genocide Convention nor the ICC's definition of genocide provide any minimum of number of people who must be harmed or killed for an act or series of acts to qualify as genocide. To qualify, however, it is widely accepted that the *actus reus* must affect many. Many are complicit in committing genocide – and the other crimes over which the ICC has jurisdiction. To date, no one has committed an international crime acting single-handedly, despite advances in weapons such as the nuclear bomb. Furthermore, one need not directly partake in genocide in order to

be convicted of the crime. Someone can be convicted of genocide if she “directly and publicly incites others to commit genocide” (Rome Statute 1998: Article 25 (3)e.).

Someone might object that not everyone who participates in a genocide may have the special intent necessary to convict him or her of the crime. This is true. However, there are two responses to this objection. Even the stringent *mens rea* of genocide can be inferred from actions (Rotberg 2010: 3). Thus although records and intelligence may not have been as closely kept on subordinates as for their superiors, genocide convictions of underlings may still be possible. More importantly, even if a prosecutor cannot prove the special intent requirement, it does not follow that genocide is therefore impossible to deter. Deterrence could still be effective even if these subordinate individuals may not have genocidal intention, because often they could be charged with other international crimes such as crimes against humanity or war crimes. Many of the second or third in command can be instrumentally motivated in a genocide by fear of punishment if they do not carry out orders, financial rewards, obtaining a perverse prestige or a horrific sort of pleasure (Glover 1999: chapter 6 and *passim*). Instead of focusing exclusively on the top-level political and military leaders, this strategy to deter genocide requires indicting and trying the individuals at the next level down. Deterring even the most difficult of the four core crimes of the Rome Statute is possible by indicting these subordinate individuals in addition to those ordering the commands.

Lawyers for these indicted subordinates might raise defenses based on duress (Article 31, 1.(d)) or superior orders (Article 33). The Rome Statute defines duress as a situation in which either the accused or someone else is under a physical

threat if the accused disobeys an order. But limits to the threat may greatly reduce the successful use of this defense. One such passage from the duress clause reads, “provided that the person does not intend to cause a greater harm than the one sought to be avoided.” This calls into question whether duress can be invoked to defend the powerful, because the harms committed by these defendants would likely be far greater than those threatened, because the accused can be on trial only for harming many people. Killing two or more people, actions often required of mid level individuals in criminal regimes, is a “greater harm” than killing one person. The superior orders defense may be more problematic for my argument for deterring individuals in secondary and tertiary positions. Anyone can be exonerated if she “was under a legal obligation to obey orders of the Government or the superior in question” at the time of the crime (Article 33, 1.(a)). This may absolve many of these subordinate individuals. But because the rule of law breaks down in many cases that are admissible to the ICC, and because many of the accused are nonstate actors not subject to any official laws in the relevant capacity, the superior orders defense may be weaker than it first appears. One final point is important. Both of these defenses shift the burden of proof from the prosecutor and to the defense, increasing the risk to the accused. Not all the second and third in command individuals may be deterred. Yet indicting subordinates may decrease the severity of international crimes because some subordinates are afraid of acting criminally and may thus refuse orders, act only within the rules of war, or decrease the severity of their crimes in hope of securing a lesser punishment.

To be maximally effective, however, the prosecutor needs to ask more than which international criminals are instrumentally rational. Even if all criminals are equally rational, the ICC should consider whether all equally rational criminals are equally deterrable. Equally rational individuals may have different degrees of risk aversion. Only by considering the risks that individuals are willing to take can the ICC's prosecutorial team decide who may be more and less risk adverse.

Weighing Nonviolent and Violent Crimes

In this section I discuss whether violent or nonviolent crimes should be given prosecutorial priority given the motivating characteristics of the archetype of each kind of individual and the comparable gravity of violent and nonviolent crimes. This is important to discuss because if deterrence is the goal and violent or nonviolent criminals are more deterrable, the prosecutor may want to focus on this type of international crime in order to maximize deterrence. I conclude that the prosecutor should allocate more resources to non-violent criminals because often non-violent criminals are equally if not more rational than violent criminals, non-violent criminals may be more risk adverse, and some nonviolent crimes are just as morally blameworthy and harm just as many people as do violent crimes. Violent crimes are those that involve guns, shells, bombs, machetes, torture, and the like. Nonviolent crimes include purposive starvation, some types of economic sanctions, purposely stealing or redirecting aid for those on the edge of survival, and so forth. Because both violent and nonviolent criminals can be more and less rational and risk adverse, using violence to decide which criminals to pursue is the wrong approach to take.

Both state and nonstate leaders can be held to account by the ICC for committing nonviolent crimes against humanity. One way to commit a crime against humanity is to commit multiple acts (Rome Statute 1998: Article 7, 2. (a)) that result in widespread or systematic (7, 1.) severe deprivations of physical liberty (7. 2. (e)) or great suffering or serious injury to bodily or mental health (7, 1. (k)). In each of these situations, the suspect must be aware that these harms would be likely occur in the normal course of carrying out these acts (30). Nonviolent international criminals often, although not always, act for instrumental reasons. Specifically, most seek personal financial gain, sometimes as a means to maintain power by paying off the necessary actors and financially choking others. The relevant questions here are whether violent or nonviolent criminals are generally more rational, whether violent or nonviolent criminals are more risk adverse, and whether violent or nonviolent crimes are worse, however measured. These questions are important because each of these factors should factor into the prosecutor's strategy.

I argue that some nonviolent criminals are similar to violent criminals in rationality and risk aversion, but because there are multiple types of nonviolent crimes, some nonviolent international criminals are more rational as well as risk adverse when compared with the typical violent international criminal. First, perhaps the most widely chargeable nonviolent offense is major corruption because it is carried out multiple times, results in deaths from, for instance, lack of health care, and is easily foreseeable in the normal course of events. If a few million dollars are earmarked for a major hospital, stealing that money will result in shortages of life saving supplies, leaving patients to die who would otherwise have survived.

Leaders generally pilfer state coffers not for ideological purposes, but so they can lead lavish lives, buy posh villas, and stash away millions if not billions of dollars in difficult to trace bank accounts. Kleptocratic leaders know they can get away with such crimes, Thomas Pogge argues, because of a flaw in the national and international system of property rights (Pogge 2002). The international community recognizes any state leader and allows her to sell state resources and borrow in the name of the state, however that person obtained power, vastly multiplying this individual's access to wealth (Ibid). In contrast to leaders who fight wars because they want to stay in power, financially motivated leaders may be more likely to want cash, so that, even when not in power, they will continue to live opulently. Major corruption can be seen as insurance. Leaders may reason that in states with weak institutions and the unlikelihood of future governments to pay out generous pensions to past presidents (see Fearon 1995), major corruption is the only way to ensure that, even if they fall from power, the corrupt leaders and their family will live well for the rest of their days.

But not all nonviolent criminals have the same motivations. The second broad category of nonviolent criminal offense is the intentional use of lethal nonviolence. Food, for instance, can be used a weapon of war. Ethiopia's government intentionally caused, at least in part, the 1984-5 famine that killed perhaps 1 million people, as part of a counterinsurgency strategy. The acting foreign minister, Tibebu Bekele, admitted that "food is a major element in our strategy against the secessionists" (as quoted in Meredith 2005: 343). Similarly, food can be used as punishment. As new research by Frank Dikötter about Mao's 1958-62 "Great

Leap Forward” illustrates, “starvation was the punishment of first resort. As report after report shows, food was distributed by the spoonful according to merit and used to force people to obey the party” (Dikötter 2010). Mao’s failed utopian reforms and use of food as incentive killed 45 million people (Ibid). These two examples show that at least in terms of the number of people killed, nonviolent crimes can be just as destructive as violent crimes.

To accurately determine to what extent these criminals are risk averse, we need more research into the threats that have been made against non-violent leaders who harm or kill multitudes (Bueno de Mesquita, Smith, Siverson, and Marrow 2003; cf. Clarke and Stone 2008). Despite the paucity of data, some non-violent international criminals are likely more risk adverse than some violent and nonviolent criminals who intentionally use their power as a weapon or to punish. This is because an inconsistency in how humanitarian intervention and heretofore how international criminal law has been used. No actor of which I am aware has used military intervention to stop or prevent nonviolent crimes, just as the ICC has never indicted individuals for nonviolent crimes. These failures erase two types of threats against nonviolent international criminals. If nonviolent criminals face roughly the same other risks as do violent criminals, then nonviolent international criminals may be more risk adverse because they opt to hold onto power by using methods that are a lesser threat to their hold on power than are violence actions.

To summarize what I have argued up to this point, the ICC should prioritize indicting nonviolent, risk adverse supreme and subordinate alleged international criminals because this will maximize the deterrence. The ICC should still prosecute

violent international criminals because some may be deterrable and retribution is important, even if retribution is disproportionate to the crime committed.

Deterrence is contingent on consistently arresting alleged international criminals.

The following sections address what practical steps the prosecutor can should to bring alleged international criminals to justice.

Complementarity and The ICC's Role in Domestic Trials

Besides deterring through international prosecution, the ICC can also deter by goading state governments to try their own citizens domestically. Ocampo has publicly stated that investigations “can promote national justice efforts” (Ocampo 2009). The “complementarity principle” permits the ICC to prosecute only if a state is “unable or unwilling genuinely to carry out the investigation or prosecution” (Rome Statute 1998: Article 17, 1.(a)). States want to guard their sovereignty closely, and the complementarity principle is perhaps the most important way the authors of the Rome Statute compromised with states in this regard. Under the *proprio motu* option, prior to indicting an international criminal, the prosecutor must carry out a preliminary investigation to determine whether there is a “reasonable basis” to proceed, and only if there is a basis – and the pretrial chamber concurs – can the prosecutor proceed (Article 15). But once the prosecutor clears that step, she is not required to indict and try the individual. Instead, she can use an investigation to pressure states to try their own citizens. The relevant questions raised by this power are when should the prosecutor choose this strategy and how

long should the prosecutor allow the gears of domestic justice to grind before she moves ahead with prosecution?

First, the ICC should push for domestic trials whenever they may be likely because both the local country's citizens as well as the ICC gain practical and normative benefits by trying alleged international criminals domestically. Keen political judgment is crucial here, because each country is unique, and only by astute political analysis can judgment discern whether the domestic judiciary and power brokers will permit a fair trial. Normatively, local justice could contribute to stronger and more legitimate domestic institutions and would show that no one, not even the most powerful politician, is above the law. Domestic judicial institutions would gain credibility after such a high profile case, especially in places such as Kenya where defendants are members of two of the most powerful political parties. Practically, local judicial proceedings would save the ICC's scarce human and monetary resources for cases that truly could not be resolved domestically. Obviating criticisms of neocolonialism, however gratuitous, would be another advantage of domestic trials. Finally, recruiting witnesses and gathering evidence would be easier given the proximity and familiarity domestic actors have with local subjects. Of course the drawbacks of corruption, nepotism, witness intimidation or murder, and politically motivated trials and outcomes, are real. But the ICC would not and should not forget about a case if domestic actors promise prosecution. Instead, the ICC should follow the case closely and announce that the ICC is shining a bright light on the case that will reach the darkest corners of backrooms where deals might be made.

Two cases, Sudan and Kenya, now under scrutiny by the ICC, highlight these difficult choices. Sudan has no realistic chance of trying its president because he holds supreme state power. Thus, pushing for domestic trials in the short run would be futile. Kenya, however, is different. In December 2007, Kenya held national elections. The incumbent, Mwai Kibaki, was accused of cheating, as was the opposition leader, Raila Odinga, and violence erupted. Political adversaries killed approximately 1,500 people, more were wounded, men raped women, and hundreds of thousands were expelled or fled to safer parts of the country. As of July 2011, no one to my knowledge has been held to account for these crimes. Kibaki and Odinga supported a domestic proposal to establish a special tribunal to try individuals responsible for the post election crimes, but parliament failed to pass it (ICTJ 2011). Concerned about sovereignty and a threat to his power, Kibaki recently said that holding domestic trials “will boost our efforts [for] peace, justice and reconciliation as well as uphold our national dignity and sovereignty; and prevent the resumption of conflict and violence” (BBC 2011). It remains to be seen if his words will be met with actions. If Kibaki is not true to his word, or if the trials are shams, the ICC can and should still hold to account the individuals it indicted.

The case of Kenya raises the question of how long the prosecutor should give states before proceeding with a trial. I don’t think there is any way to determine a concrete, universally applicable, rule. Local circumstances differ, and local knowledge and shrewd judgment are essential. But in roughly one to two years after the prosecutor begins the investigations, she should have a good sense of whether a state is able and willing to carry out fair domestic trials. At worst, pushing for

domestic trials will delay justice. A closely related issue is whether the prosecutor should issue open or sealed indictments, which is what I next discuss.

Open or Sealed Indictments?

If deterrence is the ICC's primary goal, one might suspect that always issuing public arrest warrants is the best choice because one necessary part of deterrence is the knowledge of the likelihood of being detained. But the situation is more complicated than this. I argue that only when states may realistically move to try suspects domestically should the ICC issue open indictments. The prosecutor has the powerful option of issuing an arrest warrant in secret, which is especially useful for a court without a police force. If an individual is indicted without his notice, and travels to a country that has ratified the Rome Statute, he could be arrested. Belgian authorities did just this with Congolese politician Jean-Pierre Bemba Gombo in 2008. Unfortunately, states have also flouted their international legal duty to arrest indicted alleged international criminals, as Kenya did when Sudan's president, Bashir, visited in 2010. The question for the prosecutor is when and why should she issue public or private arrest warrants given the limited police powers?

Issuing sealed indictments provides a higher likelihood of successful detainment than public indictments because if the prosecutor issues an open indictment, alleged international criminals can curtail travel and take other precautions to avoid arrest. And because a reasonable likelihood of arrest is vital for deterrence, seal warrants are in general the best strategy for the prosecutor. The problems with open indictments are illustrated by Bashir's cautious travel itinerary.

After the prosecutor issued an arrest warrant, Bashir has traveled only to countries where he was certain authorities would shirk their legal obligations to arrest him. But in cases where the prosecutor is trying to induce a state to prosecute domestically, she should instead issue public warrants in order to pressure a state into quickly and fairly trying suspects. Of course, the prosecutor's office should carefully and realistically investigate the probability of a state moving to prosecute the individuals the ICC is interested if the target state did not initiate proceedings on its own. In a policy paper, the prosecutor should publicize this strategy to allay the concern that issuing secret arrest warrants will undermine deterrence.

The Interests of Victims and Justice: Peace (or Protecting Human Rights) or (Retributive) Justice?

Even if the suspect has likely committed one or more of the core crimes, the prosecutor may choose to *not* indict someone for three reasons (Article 53 1.(c), 2.(c)). If the interests of victims or the interests of justice are better served by not continuing with prosecution, the prosecutor is granted the power to halt proceedings. (The third reason, which I leave aside here, is that the defendant is too infirm to stand trial.) Furthermore, the Rome Statute never defines what it means by the interests of the victims or the interests of justice, giving the prosecutor wide interpretive power. How then, should the prosecutor decide what these interests are and how to proceed?

My argument up to here pushes the prosecutor to not offer amnesties in exchange for peace agreements because doing so would undermine deterrence and

allow international criminals to walk free. Deterrence may in fact be weakened if the prosecutor decides that the interests of (restorative) justice or the interests of the victims are better served by withholding an arrest warrant. The choice is between a short-term benefit of protecting innocents' human rights through amnesty, and the long-term and more tenuous benefit of deterring others from committing serious widespread abuses through prosecution. Elsewhere I have argued that in transitional justice cases, victims and potential victims should often participate in such decision-making. In the case of the ICC, however, who future victims might be, and hence who should constitute the *demos* if potential future victims should be included, is impossible to determine.

The dilemma of choosing short-term protection or long-term deterrence is not easily solved, and I fear that whichever choices the prosecutor makes may leave his hands dirty (Walzer 1973). By this I mean, with Walzer, that all options will likely incentivize some to commit human rights abuses, either in the near or long term. Nonetheless, a few points are worth noting. As I argue above, complete retributive justice is impossible to achieve, so the prosecutor should not overestimate the ability of the ICC to achieve it. Preventing other injustices should be the ICC's goal, and, as unsatisfactory as it may be, I think this can be assessed only on a case-by-case basis. The prosecutor should weigh the likelihood of immediate retaliation (as Bashir did by expelling aid agencies after he was indicted) with the likelihood of each case contributing to deterrence. The prosecutor's default stance should be for indictment and deterrence. But at the same time, the ICC should

coordinate with other institutions to try to ensure protection of innocents if the ICC does choose prosecution.

Integrating the ICC into a Global Framework of Institutional Responsibilities

None of my arguments forbids an integrated approach to how the ICC should behave. Nor do they undermine the responsibilities of other actors, specifically of possible military and nonmilitary humanitarian interveners. Deterrence will take time to work. In the interim, and when deterrence fails, other institutions should protect the innocent in other ways. As troublesome as it may be, Wheeler is correct to note that in some instances “intervention by force might be the only means of enforcing the global humanitarian norms” (Wheeler 2000: 1). Problematically, major international actors are often uncoordinated and at odds with one another. The ICC is, as the international lawyer Antonio Cassese said of the ICTY, “a giant without arms and legs — it needs artificial limbs to walk and work. And these artificial limbs are state authorities” (Cassese 1998: 13). This is doubly true. Without a police force, the ICC can arrest suspects only with the cooperation of state authorities (leaving aside private security firms and international forces). Often, although not always, a state whose national is indicted is the very state that is unlikely to arrest that suspect. This brings us to the second and less acknowledged way to view the metaphorically limbless giant: the ICC can only achieve its goal of deterrence and protecting individual human rights through assistance from other states and, potentially, nonstate or supranational actors, in cases where only they can prevent or stop an ongoing, international crime. Although the ICC cannot allocate

great resources for these purposes, it should and does devote some. The ICC cannot solve all the world's problems, and I am not suggesting that it should. Just the opposite: exactly because its power is severely limited, it should consult, lobby, and interact with other powerful actors whenever it can to achieve its aims. To illustrate, in January 2011 the president of the state parties, Christian Wenaweser, met with Kenya's president, Kibaki, to urge him to establish a domestic tribunal to try those responsible for post election violations of international law, or cooperate with the ICC (ICC 2011). Another example is that the ICC should consult with the UN and its peacekeeping forces in eastern DRC before it issues an arrest warrant or actually arrests any Congolese international criminal, lest the warlord's troops rampage in anger at the news.

What Might the ICC Do Differently?

Given these arguments, how is Luis Moreno-Ocampo doing, and what should he and his successors do differently? If my argument is convincing, Ocampo should be acting quite differently. One gaping lacuna in his strategy is his lack of prosecution of nonviolent crimes. Ocampo has given no indication that he has even contemplated trying international criminals for nonviolent international crimes. To close this gap, he should investigate the likes of the leaders and high level subordinates of North Korea, Chad, Nigeria, Equatorial Guinea, and Afghanistan, all of whom have stolen from the state, implemented policies possibly rising to an international crime against humanity, or both.

Another example requiring attention of the ICC pertains to Robert Mugabe, whom the prosecutor should investigate because of his heinous violent and nonviolent offenses. Mugabe “has almost single-handedly destroyed” Zimbabwe, Robert Rotberg writes (Rotberg 2007). Once one of the countries with the highest standards of living in Sub-Saharan Africa, what Samantha Power calls “breadbasket,” life expectancy has plummeted to just 36 years (Power 2008). How has Mugabe destroyed Zimbabwe? Samantha Power lists ten ways in a piece on Mugabe entitled “How to Kill a Country.” Here I will mention only a few that likely qualify as international crimes according to the Rome Statute (Power 2003). In a disastrous land policy framed as racial rectification of colonial wrongs, Mugabe forcibly removed many white farmers, 4,000 of whom did inequitably own some 70% of Zimbabwe’s fertile arable land. The predictable result was a huge drop in food production. In just three years wheat production dropped by over 90% and maize by two thirds (Power 2003). Malnutrition skyrocketed (HRW 2009: 10-11). Moreover, in 2008 Rotberg reports that “Mugabe’s men have also continued to use food as a political weapon, first stopping the supply of grain by international relief agencies and last week [in 2008] physically stealing relief shipments to give to their own supporters” (Rotberg 2008; see too HRW 2009). But that’s not all. In a section entitled “Commit Genocide,” Power, the renowned genocide scholar, argues that Mugabe did just that against the Ndebele (Power 2003). He had some 25,000 killed (Power 2003), but his violence did not stop there. In a successful bid to remain in power, in 2008 Mugabe detained at least 2,000 people, hurt and tortured at least 10,000, and displaced at least 200,000 (Power 2008).

Why doesn't the prosecutor investigate Mugabe? By all the evidence, Mugabe likely committed both violent and nonviolent crimes against humanity, possibly rising to the level of genocide. The obvious response is that Mugabe is outside of the jurisdiction of the ICC because Zimbabwe has not ratified the Rome Statute. Although true, this does not exhaust the prosecutor's options. The prosecutor could lobby the UNSC (and its member states) to refer the situation in Zimbabwe to the ICC. Such a referral is not fanciful. The UNSC already referred another sitting head of state, president Bashir of Sudan, for his alleged crimes in Darfur. What is more, a member of the P5, China, despite its significant oil interests in Sudan, allowed the referral to occur. In this case, unlike that of Bashir, Ocampo should issue a sealed indictment thereby increasing the chance of actually arresting Mugabe – and deterring others. By not pursuing Mugabe and people like him, the prosecutor is sending a message to would be international criminals that if their methods of killing and abuse don't irk the international community, their abuses will be tolerated.

Another area in which my argument would suggest departure from Ocampo's strategy regards second and third level individuals. This might be especially pressing in Kenya because Kenyans will go to the polls again in 2012. If subordinate Kenyan leaders knew that they would face prosecution by the ICC – and not go free as they have after the 2007/8 post election violence – there might be less violence after the 2012 elections even, if the high level politicians are willing to risk imprisonment for great political power.

Conclusion

I have argued that (general) deterrence is the best strategy for the ICC given its powers and limits thereof, and that deterrence can be improved by indicting alleged nonviolent international criminals as well as subordinates to violent and nonviolent international criminals. Even the crime with the most stringent *mens rea*, genocide, is somewhat deterrable. To meet these aims, the prosecutor and his team need to overhaul their prosecutorial strategy, and I have suggested some practical steps they can and should take. Only by correcting the structural problem of lacking a police force will the ICC be most able to deter. Although a police force is one of the most pressing issues for the ICC, it is also one of the most intractable. Until – and after – the structural problem is solved, the argument I proffer here is the best option given the nonideal world we inhabit.

Chapter 5

Democratizing Transitional Justice: Transitional Tradeoffs and Democratic Theory

Introduction

The primary related questions this chapter asks are how should transitional justice decisions be made and who should be empowered to make them. I suggest that prevailing theories of transitional justice are flawed because of their democratic deficits and I construct a democratic theory of transitional justice. My thesis is that because transitional tradeoffs are inevitable (Leebaw 2008), the individuals most affected and most likely to be affected by any transitional justice mechanism should be enfranchised to make transitional justice choices whenever their basic democratic rights are not put in a high degree of risk by doing so. I define transitional justice as a multitude of potential types of mechanisms enacted to deal

with governmental or nongovernmental actors that widely violated human rights in the past as part of a process of trying to improve the basic structures or replace the actors that caused or allowed widespread human rights violations.

Two main possibilities that are sometimes in tension compete for our allegiance in societies facing transitional justice, each of which is intuitively appealing. Retributivist sentiments often embodied in the rule of law push us toward preferring to arrest, try, convict, and punish at least the organizers of the worst crimes of a former regime. At the same time, achieving peace and preventing more innocents from having their human rights violated is another, and sometimes opposing, compelling goal. If not offered amnesty or pardon, powerful politicians and warlords who may have violated international criminal law can threaten further widespread harms, a menace we must take seriously. This is widely characterized as the peace versus justice trade-off (Rotberg and Thompson et. al. 2000; Sriram 2004; Kerr and Mobekk 2007; Roht-Arriaza and Mariezcurrena et. al. 2006), but it is more accurately viewed as a tension between peace and punishment.

Either choice privileges certain groups over others – victims or potential victims, chiefly – just as each privileges forward or backward looking conceptions of justice. Putting aside for the moment different conceptions of transitional justice, the peace versus justice tradeoff need not exist in every transitional case. Indeed, some claim peace can only be achieved with justice. This could mean either of two things. First, justice could be necessary for peace, or, second, justice could be sufficient for peace. While either might be true in some circumstances, often both are empirically false. The claim that peace requires justice may be too vague to have

any real substance or practical guidance even if justice is closely connected to peace because of the wide range of types of justice in play in a transitional society – retributive, reparatory, restorative, reconciliatory, international, national, local, and so on.

Although recent advances in scholarship as well as in international criminal law, in particular in the Rome Statute of International Criminal Court (ICC), have placed more emphasis on victims, their input has been largely limited to witnesses, court protection, court proceedings, and reparations, crucially omitting what sort of justice victims would prefer (Schabas 2007: Chapter 10; Findlay 2009; Drumbl 2007: 42-4, 133-8). Commenting on surveys of over 900 victims of conflicts done by Ernest Kiza, Corene Rathgeber, and Holger-C. Rohne (2006), Mark Drumbl concludes that their

research does not support those looking for simple solutions and singular preferences for one modality instead of another. In fact, the central conclusion supported by the research is that victims prefer pluralistic solutions and understand accountability to proceed sedimentarily, meaning that international criminal law's push for prosecution and incarceration, which may lead to operational exclusivity given scarcity for resources, may not be particularly effective (Drumbl 2007: 43). These victims' preferences call for eschewing any universal model of transitional justice. The recent progress in incorporating victims into criminal proceedings has concentrated too narrowly on one type of transitional justice while neglecting the more pressing and broader question of what sort of justice victims favor in the first place. That democratic deficit is the one this chapter addresses (Drumbl 2007: 133-8).

For the purposes of this chapter, I define democracy as direct democracy, which requires popular referenda. These are one-off ballot initiatives on which each enfranchised individual votes. I do not mean liberal representative democracy. Though liberal representative democracy is rightly the typical goal of a transitional justice, my use of democracy is more specific in subject matter and time because it addresses only transitional justice. I only mention this here to provide a context for the chapter; in the second half of the chapter I further discuss and defend this view.

Democratic theory may be of little guidance answering the question of who should decide which individuals should be included in democratic processes because democratic theory typically takes a *demos* as given (e.g. Goodin 2007: 43 and *passim*; Miller 2009). I suggest otherwise. I use three democratic principles: collective self-determination, the “affected interests principle,” and the protection of basic democratic rights to guide who should be enfranchised in transitional justice decision-making. Who constitutes the *demos* is an especially poignant question given ethnic, religious, cultural, racial, and other fissures facing societies in transition. Using democratic means to decide some transitional justice questions may be cathartic, educational, example-setting, and empowering. Conversely, democratic decision-making could divide and entrench former adversaries along the same pernicious lines as drove or solidified during conflict (Gutmann and Thompson 2000). If a stable democratic polity is the goal, which approaches are most likely to achieve this, and how should this consideration relate to others, especially if they may be in tension?

Those harmed by a former regime and those at risk of future harms have the

greatest stake in transitional justice. The international community may be affected by what seem to be exclusively local transitional justice decisions. Because justice and democracy are normative ideals, because transitional justice may relate to and abet democratization, because consolidated democracies are more peaceful toward other democracies, and because the international community may become involved in violent or nonviolent transitions such as Libya's in 2011, international actors have moral and prudential reasons for improving transitional justice mechanisms (E.g., Doyle 1983a, b, 2005; Russett and Oneal 2001; Slantchev, Alexandrova, and Gartzke 2005; cf. Rosarto 2003, 2005).

The state is the assumed level of analysis, but it is by no means limited to this: states like the former Yugoslavia can break apart, form new states, and individuals who are deeply affected may flee as refugees beyond state borders. Although transitional justice and related dilemmas are not new – Athenians in the 5th century BCE faced similar issues (Elster 2004: Chapter 1) – today and in the years to come, transitional justice is an especially pressing issue. Some 40% of the world's countries were nondemocratic around 2000, and since 1974 over 90 countries have transitioned to democracy during the “third wave” (Huntington 1991; Diamond 2008b: Chapter 2). Over approximately the same time period, more than 30 of these transitions used truth commissions (Philpott 2009: 389). The Arab uprisings of 2011 show how timely and pressing transitional justice is. Larry Diamond predicted in 2008 that many nondemocracies will likely transition to democracy over the coming decades, and if history is any guide, this prediction will likely be accurate (Diamond 2008b: Chapter 3). The sheer number of the individuals

immediately involved and secondarily affected by successful or failed transitional justice, as well as its influence on democratization and democratic consolidation are reason enough why this topic should be of interest to many.

This chapter is divided into two main sections. In the first section, I suggest that there are three main options for transitional justice societies: prosecutions, amnesties, and truth and reconciliation commissions. Choosing any one or combination of these presents a tradeoff. I suggest that the main problem with theories justifying any of these options is that they fail to adequately incorporate democratic principles. In the second section I present my theory of partially democratic transitional justice. There I argue for a process that would minimize bias and maximize democratic choice among those most affected by past wrongs and those most at risk of future wrongs should the transitional justice process derail. I argue that a new institution should be created for this purpose that would consist of two tiers of panels of experts, the first of which would be chosen by the UN General Assembly. The first panel would consist solely of international experts and this panel would choose the second, which could include individuals from the transitional just region. This second panel would choose to empower victims and potential victims to vote on transitional justice tradeoffs whenever the risk to the voters' human rights would be in grave danger because of the vote. I finally consider objections and then conclude.

I. Transitional Tradeoffs, Democratic Theory, and the International Community

There are three basic options that countries generally use for transitional

justice: criminal prosecutions, amnesties, and truth commissions. Societies can combine and modify these in various ways, but some combinations are incompatible. For instance, if someone is prosecuted, he cannot also be offered amnesty unless the prosecution is halted. Often some combination of transitional justice options may be best for a society. The democratic, post-apartheid South African government, for example, decided to use a combination of prosecution, amnesty, and a truth and reconciliation commission to achieve their goals (Minow 2002: 24). Even given this combination of transitional justice options, there are further choices about who should be offered amnesty, who should be prosecuted, and how the truth and reconciliation commission should relate to the two previous options. Thus tradeoffs exist even if the general structure of a transitional justice mechanism is agreed upon. The new South Africa government decided on a stringent requirement of who could qualify for amnesty, granting it to less than 5% of those who applied (Minow 2002: 24). Using this model in an attempt to balance accountability for past wrongs with the need for an historical record and reconciliation, South Africa's new government calculated this would be the best option given the numerous serious political challenges.

As South Africa's case suggests, which transitional justice goals a society deems important informs which strategies or combinations of transitional options the society should choose. If the majority of a population has a strong desire for retribution, they might choose criminal prosecution even if this threatened to undermine a fragile peace or delay and disrupt reconciliation. If people decide it would be better to forgive in order to provide securer and better lives for

themselves and their families, they conversely might choose amnesties or amnesties conditioned on a full divulgence of perpetrators' past wrongs. This illustrates that some transitional justice goals are incompatible and that there are numerous considerations, options, and tradeoffs for any transitional justice society. Because of these options and tradeoffs, I suggest that democratic processes should sometimes be used in transitional justice cases. I will show below that the international community plays an indispensable role in democratizing transitional justice. But first I will show that some of the leading scholars of transitional justice present theories fraught with democratic deficits. In turn I present arguments for prosecution, amnesty, and truth and reconciliation.

Known as liberal internationalism or liberal peace, the dominant Western theory of what to do after widespread human rights abuses is punishment according to law and the promotion of liberal democracy at the state level (Philpott 2009: 390-1; Paris 2004). Drumbl calls the legal half of this "liberal legalism" (Drumbl 2007: 5, 35-41). Its proponents advocate for holding individuals, not collectives or states, responsible for their wrongs through domestic or international criminal law (Orentlicher 1991; cf. Orentlicher 2007). Tasked with prosecuting individuals who commit the worst international crimes, the ICC embodies this view. Its existence is widely seen to add pressure to states to use legalistic means to deal with domestic crimes that also qualify as international ones because the ICC can only prosecute individuals if states are unable or unwilling to do so. Thus if states would prefer that the ICC not try its nationals, they may decide to prosecute the accused domestically. Liberal legalism is justified as a theory of punishment on retributive grounds that

date at least to Kant (Kant 1797 [1996]: §6:331-6:337; Hegel 1821 [1967]: §82-104; Drumbl 2007: Chapter 6; May 2004: Chapter 12) or on consequentialist grounds because consistent prosecution is required for deterrence (Drumbl 2007: 60-63, 169-173; Philpott 2009: 400). Despite that liberal internationalists are committed to liberal representative democracy for the state in question, they do not argue for democratizing the transitional justice process.

There are parallels between those who justify prosecutions and those who justify amnesties in that both generally eschew democratic transitional justice processes despite arguing that a democratic state should be the end goal. Larry May argues that amnesties are not often justified, but the collective interests of peace and democratization of the state may sometimes justify them (May 2004: Chapter 13). Jack Snyder and Leslie Vinjamuri similarly argue that promoting peace and deterring future human rights violations should take precedence over punishment when doing so would strengthen domestic democratic institutions and the rule of law (Snyder and Vinjamuri 2003/4: 12-15 and *passim*). Christopher Wellman comes closest to arguing for a democratic method of transitional justice when he defends the view that whenever a domestic regime is legitimate, i.e., when it protects human rights, its choices, including amnesty, should be respected (Wellman 2008).

Wellman's respect for collective self-determination is democratic on some grounds, but his argument is subject to the problem of assuming the state is the correct boundary for the *demos*, which I argue is often incorrect given the all affected interests principle. Wellman's theory also provides little guidance for how to establish a transitional justice mechanism if a dictator is still in power or if there are

ongoing human rights abuses. May, Snyder, and Vinjamuri all ignore democratic decision making for the process of choosing amnesties (or other transitional justice options) even though they justify their arguments in terms of promoting democracy.

Arguments in favor of truth commissions are subject to the same democratic deficits. Truth commissions are often justified in terms of reconciliation (Minow 2002: 24; Tutu 1999) or “expressivism,” meaning mechanisms that establish a historical record and that allow a society to express its condemnation of wrongs (Drumbl 2007: 173-80). Truth and possible reconciliation are sometimes considered so important that individuals who committed terrible crimes are offered amnesties or pardons for telling the full truth about what they did and knew. May argues that “amnesties and pardons are only justified when the reconciliation makes things better for those who were the object of harm” (May 2004: 251). Notice that although May justifies this view in terms of victims’ interests, he decides this without the victims’ input. And even though Philpott focuses in part on the *process* of political reconciliation, he does not ask the question one temporal and logical step back: namely, what should the process be for deciding whether political reconciliation should be a transitional justice goal (Philpott 2009)? Many of these theories are thoughtful and interesting, but their omission of democratic processes is troubling.

One might imagine that scholars reject democratic means of choosing transitional justice mechanisms because victims cannot fairly assess those who may have harmed them. As Locke argued, victims should not have a say in punishing those who harmed them because in the state of nature “passion and revenge will

carry them too far in punishing others” (Locke 1689, II, §13). Just as one is a bad judge in one’s own case, a society full of victims is a bad judge in its own case. This objection confuses permitting victims to judge in their own cases *how severe* punishment should be with *whether* victims should have a say if perpetrators should be tried at all. Whereas Locke is objecting to the first case, my theory refers to the second. Locke and others do not have in mind transitional justice, where the brunt of forward and backward looking tradeoffs are borne or could be borne by victims or potential victims. I agree with Locke that victims should not be able to decide in their own cases how severe punishments should be. The role of the international community in my argument ensures that only options that have fair procedures and punishments for the accused are possible. This is why the international community must play a role, make choices about who will be empowered to vote as well as what issues will be put to a vote, and oversee the establishment of any transitional justice mechanism. Before discussing the role of the international community in detail in the second half of the chapter, I discuss the objection that someone like Wellman might make contesting whether the international community should be involved at all.

One might protest that my reliance on the international community is neocolonialist or that it is inconsistent given my stated commitment to democracy. Should not the society in question make its own decisions? A central tenant of democracy theory is collective self-determination, and my reliance on the international community to decide when transitional justice issues can be voted on seems like it undermines this principle. These are serious concerns, especially given

the centuries-long history of Western states' purportedly good international intentions gone awry and their raw, amoral pursuit of self-interest. My basic response is this: my theory balances the democratic principles of collective self-determination, giving a say to those who are most affected by a decision, and protecting the basic democratic rights of those most at risk. These are all democratic principles and sometimes they may be in tension. I discuss ripostes to these criticisms in more detail.

First, notice that my theory may actually give people more of a say in their collective future than alternative schemes would because in some cases a new government is not democratic even if it generally respect human rights (excluding a human right to democracy). If a new government is antidemocratic to some degree, there is no real collective self-determination. Even in such circumstances, my schema would still allow a transitional justice vote. Conversely, if a government is a representative liberal democracy, it may not be responsive to the popular will on transitional justice issues. That representatives in a democracy do not always make choices that coincide with popular opinion is a characteristic of the regime type that some praise and others scorn. Furthermore, no matter the regime type, those who were or may be most affected by transitional justice decisions may not be coterminous with a state's boundaries. Refugees may have fled near and far. Or a new smaller state could now exist in a corner of what used to be a vast state. If either refugees have fled or a state has redrawn its territorial boundaries, relying on a state's choices may exclude individuals who should have a say in transitional justice decisions based on the affected interests principle.

The critic then might reply that the international community should only become involved if a democratic state excludes refugees or those who were affected by the past regime. But especially if a polity is democratic and responsive to its citizens' wishes should we be wary of leaving transitional justice choices up to the state, contra Wellman (2008). Consider the following cases. If a majority of the state's people were members of the group that committed the most atrocities, the new government may decide to not implement any sort of transitional justice. Conversely, if a previously abused majority establishes a democratic and popularly responsive government, they may establish sham trials that are closer to summary executions than the rule of law. If either a majority that committed abuses or a majority that was victimized takes democratic power, a terrible injustice might result without the international community's involvement. Even if these fears could somehow be allayed, allowing a democratic polity to make its own decisions is problematic because people are affected by past harms and could be affected by future harms to vastly different degrees. According to the affected interests principle of democratic theory, degree of affectedness should matter for whom should get a say, and how this say should be weighed. Because this principle is not a human right (at least as listed in the UDHR), Wellman's theory cannot account for it (Wellman 2008). Thus simply allowing any democratic and popularly responsive state to decide its own transitional justice mechanisms may be problematic on democratic grounds.

Finally, protecting basic democratic rights is necessary for exercising collective self-determination and my theory balances the desire for exercising

collective self-determination with protecting individual rights. If voting on a transitional justice issue jeopardizes these rights, the second panel can decide to put nothing to a popular vote. It could decide itself on transitional justice mechanisms in the extreme cases when voting would put the democratic rights of many at risk.

For these reasons, paradoxically, democratic principles including collective self-determination require the involvement of the international community in societies facing transitional justice. Just because the international community must play *a* role, it does not follow that *any* role by the international community is preferable to all local options. I will argue for a specific, hybrid role of the international community that generally includes local participants in all transitional justice decision-making but avoids the possible problems of local participation that I note above. In the second half of the chapter, I define who exactly I mean by the international community and present a theory of why, by whom, and under what circumstances referenda should be employed or rejected in transitional justice decisions.

II. A Partially Democratic Transitional Justice Theory

One of the primary problems of international law and the international order in general is that enforcement mechanisms are weak when compared with the domestic sphere. Ideally, periods of transition would be backed by enforceable international law and robust peacemaking and peacekeeping operations that could protect the vulnerable, but, despite significant advances since WWII, that ideal is far from being realized (Paris 2004). Until that point is reached, I argue that the people

who have been and might be affected by past and future wrongs deserve varying degrees of say in the transitional justice process.

Specifically, I suggest that a two-tiered set of experts should serve on panels that in turn can empower victims and potential victims to vote on transitional tradeoffs. To limit bias, the first set of experts would be composed of only international experts, excluding representatives from the affected region. The first panel would choose the second set of experts, the latter of which could include individuals from the region affected, so long as the first panel judged them to be sufficiently objective. The second panel would then make the difficult decisions of who should be empowered, to what extent, and so on, to vote on transitional justice tradeoffs. My proposal limits democratic decision making in three ways. First, it limits who should have a vote in transitional justice choices. Second, it limits when democracy should be deployed. Finally, it limits which decisions should be put to a vote. The international community has a powerful role in this approach to transitional justice, but at the same time my theory accounts for local differences in culture, custom, circumstances, and history in all cases, not just those where referenda should be used.

Democratic decision-making through a direct vote or through representatives is neither the only legitimate means of deciding a question, nor is it always an appropriate choice, even when it is one of several legitimate options. For example a doctor can legitimately treat a consenting patient despite not being democratically elected. Indeed, we would not send our family members to someone claiming to practice medicine if her only or primary qualification were that she won

the latest round of elections. I argue throughout this section that because of the circumstances of transitional justice, democracy is sometimes, and only sometimes, the appropriate choice in transitional situations.

Whether any constraint on democracy can itself be democratic is a question at the heart of democratic theory. Rousseau thought that one would have to give up *all* rights when living in civil society that genuinely expressed the general will so that one could not have one's rights violated if the demos decided to harm or kill someone or some group of people (Rousseau 1762). Killing or otherwise disenfranchising citizens from voting is clearly anti-democratic and not merely unjust (Goodin 2007: 47). Indeed, democracies often constrain domestic law making in two related ways: through a set of rights enshrined in a bill of rights or constitution, and through judicial review, both of which aim at protecting individual rights and democracy itself. While here I cannot sufficiently defend the position that some constraints on democracy are themselves democratic, I hope this short discussion at least shows that there are some good and widely accepted reasons why this may be true. Justice's relation to democracy cuts to the core of both concepts (Shapiro 1999; Dowding, Goodin, and Pateman et al. 2004), and here I pull aspects of these ideas together to present a model of democratic transitional justice.

Before moving on, I should answer a basic question concerning the sort of democracy I am speaking of here. Should democracy in transitional justice be direct or representative, and should the voters get to make this choice? Domestically citizens are often neither given a choice about whether they would prefer

democracy or dictatorship, nor are they given a choice about the *sort* of democracy they would prefer, whether direct, representative, parliamentary, or presidential (see Jefferson 1789 and Rousseau 1762, Book 3, Chapter 18 and 12-4).²⁶ I suggest that those enfranchised to vote on transitional justice decisions should use referenda (and have their choices sometimes constrained in other ways) for the following reasons. Representatives are useful when there are many issues. In contrast, only one or a few questions will be put to voters in the case of transitional justice and only once or a few times per transition, allowing the voters sufficient time to deliberate and decide. Whereas representatives often decide issues that have no great impact on their constituents, the effects of a transitional vote may literally mean life or death for the individuals involved, providing further rationale for direct vote. The first issue we must turn to, then, is how the demos should be constituted.

a) Who Should Be Included in Transitional Justice Decision Making?

Constituting the *Demos*

I address and critique three accounts of constituting the demos – the affected interests principle, the democratic utilitarian principle, and the coercion principle – and suggest a fourth is apposite for transitional justice, namely, a victims and potential victims principle. I then consider how the electorate's votes should be weighed and a number of objections to my view. Democratic theory's boundary

²⁶ New Zealand is one exception. In 1992 and 1993 New Zealand voters decided to switch to a proportional representative system of voting from a majoritarian one through a popular referendum (Lijphart 1999: 25-7). Thanks to Brian Bernhardt for this point.

problem, or, as Goodin calls it, the problem of “how to constitute the *demos*” (Goodin 2007: 40 and *passim*) is “who should be included in the *demos* or constituency” for democratic choices or votes (Miller 2009: 201). In some ways the boundary problem is easier to address in the specific circumstances of transitional justice than it is in general, yet in other ways the problem remains subject to the same difficulties. It is easier because the vote is only done once for every transition – it does not apply to a whole system of government that must function over time – and the issue area is tightly constrained. Still, these facts alone cannot determine which individuals should be included and excluded in any vote. The boundary question for transitional justice remains difficult because some principles, like the all affected interests principle, apply equally to any decision made (Goodin 2007). I start with this principle.

A foundational democratic ideal is that the people who are affected by a decision should have a say in that decision (Goodin 2007; Miller 2009). If democracy at its heart is collective self-rule, there is a strong case for using some variant of the affectedness principle in any democratic theory. Goodin cogently argues that because the opportunity cost of any decision could affect anyone on earth, it “would mean giving virtually everyone everywhere a vote on virtually everything decided anywhere” (Goodin 2007: 68). A radical principle, this would expand the *demos* of transitional justice decision making to everyone on earth. As I argue below, this ecumenical principle is overly broad for transitional justice because it would include perpetrators who should not have a say in transitional

justice decisions due to their conflict of interest. It also ignores political realities that would prevent its implementation.

Democratic Utilitarians might make a similar argument for how to constitute the *demos*. The main point of this account is that every resource used for transitional justice be applied in some other way, and might benefit all living and perhaps future persons (and possibly all sentient organisms). This view would support everyone in the whole world having a chance to vote in each decision, since, for example, the more than \$260 million allocated to the ICTR in 2006-7 (Drumbl 2007: 131) could be better spent on, say, poverty eradication. Putting this account into action is impractical in the near term. There is no political will for such a principle, let alone such a principle just applied to transitional justice.

David Miller favors a different way of narrowing and choosing the *demos*, which I will call the qualified coercion principle (Miller 2009: 218-25). Instead of including anyone who is affected by a democratic decision, or those who are prevented from making certain decisions, the coercion principle suggests that the *demos* should only be expanded if “one *demos* finds itself systematically vulnerable to the decisions taken by another” (Miller 2009: 224). Prevention for Miller means prohibiting an individual from one or a few courses of action, while coercion requires one course of action with severe penalties if that single option is not followed. Miller is not focused on transitional justice. Yet his defense of this principle for the boundary problem in general is useful here. I put aside the objection that who is coerced by a decision may depend on who, in the first place, is empowered to make that decision and thus cannot provide a solution to the

boundary problem (Goodin 2007: 52) Applying Miller's theory to transitional justice underscores another weakness in his proposal since in transitional justice suspects are often coerced and not simply prevented in Miller's sense of the word. According to his principle, perpetrators should be able to vote in their own cases. But because of perpetrators' conflict of interest, we need yet a further theoretical way to narrow the scope of the *demos* in the case of transitional justice.

To determine who constitutes the *demos*, I propose to include only those wronged or harmed, and those most likely to be wronged or harmed: namely victims and potential victims (see Findlay 2009; cf. Brown 1995). While victims and potential victims are or could be affected and coerced by transitional justice decisions, they furthermore are or could be harmed and wronged, by definition. Precisely because harms are morally distinct from being affected or even coerced, and because they are especially egregious, victims and potential victims assume a special place in my theory of transitional justice. Since transitional justice deals specifically with tradeoffs of how to deal with past wrongs and possible future wrongs, and the tradeoffs between the past and the future, victims and potential victims deserve a unique claim to a say in this process.

The defender of the all affected interests principle might reply that alleged perpetrators should have a say in the transitional justice decision because they are certainly affected by any transitional justice choice. This overlooks a few issues based on desert. First, it matters not only whether and to what degree people are affected by a decision, but also how people are affected. Victims and potential victims have been or could be deeply wronged, whereas excluding alleged

perpetrators does not put them at the same risk. Because all transitional justice choices and punishments are guaranteed to be minimally just, perpetrators cannot be wronged no matter what victims and potential victims decide. Second, as Locke argued, people are poor judges in their own cases, but victims and alleged perpetrators are poor judges for different reasons that matter morally. It would be worse to allow perpetrators to vote than it would be to allow victims to vote because if enough perpetrators vote for options victims disagree with, victims will feel doubly wronged. Alleged perpetrators face incentives to press for whatever would mitigate their circumstances. The harms and potential harms of victims and potential victims are sufficiently bad that these people deserve a say in transitional justice decisions. Excluding the alleged perpetrators does not affect them in a way that is morally problematic because given their alleged role, they do not deserve a say in these decisions.

The utilitarian critic and Goodin would make the similar objection that all the costs and effort put into the transitional justice work might affect many other people besides and thus everyone should have a say in such a decision (Goodin 2007). This objection might be termed an ideal objection given that they rely on ideal theories, but we also need nonideal ones “to cope with the injustices in our current world, and to move us to something better” (Anderson 2010: 3). I take this nonideal approach even though it is informed by ideals of democratic theory. My practical approach stresses that whatever the costs of transitional justice are, the political zeitgeist is such that the funds allocated for transitional justice would never be available to spend as the utilitarian would prefer. Nor would the political realities

allow everyone in the world to vote on a transitional justice (or any other) issue. We need a nonideal theory, one for the present and for the coming decades. Perhaps over time the utilitarian or the all affected interests' proponent could change enough people's beliefs to make their ideas realizable, but in the interim we need another principle by which to more fairly make transitional justice decisions.

Objections and Weighing Votes

What if a majority of citizens were neither victims nor perpetrators, and are unlikely to become victims in the future. Let's call these neutral persons. Shouldn't these people, people who committed no wrong, have a right to vote in the future of their own society? For example, Rwanda has some of these neutral persons. Up to two million people were involved in the Rwanda genocide, or more than 20% of the population, most of whom were radicals Hutus who shared some degree of genocidal intent, or moderate Hutus who were coerced to kill and harm (Kinzer 2008: 194). The majority of Hutus did not directly partake in the killing, though many were bystanders. Although these people were clearly affected by the genocide and civil war, they were not affected in the same way as victims were.

Should perpetrators who are also victims, e.g. the moderate Rwandan Hutus that were forced to kill by being threatened with death or harm to their families,, or child soldiers in Sierra Leone (E.g. Beah 2008, Singer 2006), be permitted a vote in transitional justice decisions? Because the specifics of each case vary in morally significant ways, victims who were also perpetrators may sometimes be permitted

to partake in the vote, though this decision will be left up to a panel of experts (discussed in the next section).

A particularly thorny issue is how the deceased and their interests should be accounted for (Mulgan 1999). Those killed by the past regime are unequivocally victims. In domestic criminal trials, a prosecutor presses for conviction, but this advocate does not, strictly, represent the interests or desires of the deceased. Obviously the dead cannot express their views. While this is less of a problem in a domestic criminal case since the law is clear both in procedure and range of penalty, the victim herself need not and perhaps should not have a say in the outcome of the trial. Dilemmas are far more prevalent in the case of transitional justice because the murdered could plausibly argue for either forward looking or backward looking justice. Does restorative justice privilege the living and retributive justice the dead? Maybe the murdered would argue that perpetrators committed such heinous crimes that they deserve the harshest punishment allowable. Or she might argue that exactly because she now understands how harmful being murdered is, she prefers forward looking justice so that not a single person more must meet her fate. When the deceased clearly express her wishes prior to death, her desires can and should be taken into account, and perhaps wills should include such questions as the ones addressed in this chapter. Without such documentation, though, another option would be to empower their surviving family members to vote in their stead and to have as many votes as she has dead family members. Assuming the interests of another, including someone deceased, is problematic for many reasons, including that there is no way to know if a surrogate is simply voting her desires and claiming

it as another's wishes. Conversely, not giving the dead any say or representation does not exclude their interests from decisions. Survivors will have their murdered loved one at the front of their minds and emotions when considering what sort of justice is preferable.

Even if the *demos* is limited to victims and potential victims, it leaves open, as the issue of the deceased shows, how votes should be allocated within this group. It is not at all clear, in transitional justice, that each person in the *demos* should have one vote, despite this widespread practice in democratic polities. If Goodin is right that "equal political power is arguably the cornerstone of democracy" then everyone in the *demos* should get one vote (Goodin 2007: 50). Overlaying this foundational piece of democratic theory onto transitional justice may be moving too quickly, however. Perhaps those who were harmed more in the past deserve a greater say than those whose harms were trivial, or perhaps those whose lives are most at risk of future severe harms should have more influence than those either at little probable risk, or whose risk may be high but who, for whatever reason, may likely be harmed only trivially. Or perhaps those who have both been previously wronged and may be subject to further future abuse deserve double or at least more influence than those only belonging to a single group.

One problem with denying one person one vote is that it opens a potential division *ad infinitum*. The influence any one person can have, in the case of transitional justice, could be divided any number of ways and into infinitely different modicums of power. Perhaps some fine grained, if not infinitely divisible, division of power would be most appropriate. Though because of practical

constraints, some rougher allocation of power that approximates why different individuals should have different levels of influence is required.

Harry Brighouse and Marc Fleurbaey develop a useful theory that suggests a proportionality mechanism relative to one's stake or interest in a decision should determine the degree of influence each person has in a democratic decision (Brighouse and Fleurbaey 2010). Rather than deciding a universally applicable precise allocation of power here, because circumstances differ from society to society, I will instead make an argument for a range of influence within which the panels of experts can move. Although harms differ in severity – rape is not equivalent to having one's car destroyed – because every victim and potential victim is by definition at risk or already harmed, all deserve at least one vote. One person one vote should be the lower limit of power allocated. If a victim deserves one vote, a victim who may be wronged again deserves twice as much power to determine what sorts of goods are most important to her. Victims who are also likely potential victims can, at the maximum, be allocated twice as much voting power as either only victims or only potential victims. Because each transitional case will differ in morally relevant ways, the panel composing the transitional justice framework should have some latitude in setting vote weights. Without such limits, too much power would be allocated to the panels that make transitional justice decisions, in effect allowing them to manipulate the democratic process. But are any of these groups really able form coherent decisions at such difficult times?

A classic objection to democracy, especially acute in transitional and post conflict periods, is that the common voter lacks sufficient information and expertise

to make a wise decision. Empirical knowledge about which strategies will better function in a transitional period, and what sort of goods each strategy favors, is just emerging to highly educated academics and practitioners have spent their lifetimes doing studying such cases (Snyder and Vinjamuri 2003/4; Van Der Merwe, Baxter, and Chapman et. al. 2009; Kim and Sikkink 2010). A voter would have to weigh numerous tradeoffs based on the cutting edge research over which there is no consensus. These tradeoffs include the ones I discussed in the first half of the chapter such as peace, retributive justice, deterrence, truth, and more. But even more issues are at stake. The voter should also consider that newly democratizing countries may be war prone, what assists democratic consolidation, and the probability of any of these choices having successful outcome in the case before her (Mansfield and Snyder 2005, 2007, 2009; Collier 2009; Paris 2004). That all of this knowledge could be summarized, disseminated, and quickly processed seems unlikely, especially when infrastructure has been destroyed and people are distraught over having lost the most important people and possessions in their lives.

One response to these trenchant criticisms would be to withdraw democracy as a tool of transitions. This is within the power of the second panel, as I discuss below. A system of courts is often anti-majoritarian because judges are not elected and judicial review is by its very nature a check on democratic law making (Walzer 1981 [2007]). International law is far from being democratically formed because there is no global democratic legislature, and while many democratic states are represented in treaties that are the bases for some international criminal law (such as the ICC), many states are themselves not democratic. In some ways liberal

legalism, as noted above, is an attractive choice, especially to Western liberals who believe the rule of law should be applied equally to everyone everywhere. But because of the unique circumstances and weighty tradeoffs inherent to transitional justice, legalism offers too little choice to those victimized or most likely to be victimized. Democracy is necessarily imperfect and victims will surely not have perfect information, just as the panels of experts will not. Victims and potential victims possess a different sort of knowledge than elites do, however. They have lived through and been deeply affected by the politics of their region. Objections to technocratic antidemocratic governance can be answered by procedural and substantive ripostes. Procedurally, leaving the decision up to experts is unfair. Why should those with most at stake be spoken for unelected others? Substantively, just as domestically democratic outcomes are in general superior to any sort of nondemocratic governance, they would likely be so for transitional justice as well. Domestic voters are not experts and must weigh arguably even more factors when voting for a candidate because national level candidates decide local, national, and global issues of all stripes. Of course making such an empirical claim must remain speculative at the moment because since my approach has not been implemented, there is no empirical information.

A cogent objection is that excluding alleged perpetrators from the democratic process *before* trials or other fora violates the presumption of innocence. Another way to put this is that excluding alleged perpetrators unjustly assumes exactly what trials or other proceedings should decide. Exclusion should not be equated with guilt for the purposes here. What is important is minimizing a conflict of interest,

and even innocent defendants have conflicts of interest, as they would likely prefer to not be jailed until a trial and put through an onerous legal process. The potentially guilty can assume different forms. First are those accused of crimes who are unlikely to become victims in the future and who were not victimized. They can be excluded from democratic decision making because they are not victims or potential victims, and have a strong conflict of interest. The second category, those accused of crimes who were victims as well, or may become victims in the future, or both, is more complicated. For example, the moderate Hutus of Rwanda who were forced to kill or child soldiers could become victims or perpetrators again. Take Ishmael Beah, a child soldier in Sierra Leone who was abducted by rebels and first experienced war when he was just twelve years old (Beah 2007: 6 and *passim*). Because Beah was coerced and not an adult, after a certain amount of time perhaps he should be given a vote. On the one hand, individuals like the moderate but coerced Hutus of Rwanda have a double claim to a vote since they are both victims and may become victims again. On the other hand, as potentially guilty perpetrators, they should be excluded from participation. Although this group of defendants does have some claim under a victim-centered account, their powerful conflict of interest should likely exclude them from transitional democratic decision making. Whether anyone from this group should have a vote can be left to the panels of experts, to which I now turn, since again the specific circumstances vary greatly.

A similar objection holds that dividing a society into a group of victims and potential victims, and everyone else, would entrench inveterate animosities instead of moving beyond them. Wendy Brown might put the objection as follows (Brown

1995). She might claim that basing decisions on injuries and potential injuries might unwittingly perpetuate the very structures of injustice and maintain the chronic hatreds that transitional justice mechanisms are meant to heal. This is a real potential problem and one that should not be taken lightly. My response is this. These critics privilege reconciliatory types of transitional justice over other sorts such as retributive justice, but making this choice for the individuals most deeply harmed and potentially harmed by the past regime is exactly the sort of paternalism my theory attempts to avoid. Those my theory empowers know better than anyone what is at stake and what risks they have faced and will have to face. Furthermore, my theory already accounts for this worry through the power given to the panels. In extreme cases where divisions between those empowered to vote and those excluded from voting are likely to result in violations of a significant number of basic democratic rights, the second panel is empowered to not allow a vote on any issues.

A final objection is that some victims, such as victims of sexual assault, may not want to be publically identified. I agree with the spirit of this objection; in no way should transitional justice decisions make victims worse off unless individuals themselves decide that the risk or suffering is worth it for whatever reason. This objection can be handled in a number of ways. First, advances in technology such as secure Internet and mobile phone connections allow for electronic voting. No one would have to know who is enfranchised and all communication could be private via electronic means. Even in some of the poorest places on earth, cell phones are ubiquitous. Second, because my theory includes potential victims in the *demos*, even

if someone did find out that someone else was enfranchised, the enfranchised person could say that they were included because of their risk of being a potential victim. Finally, enfranchised individuals need not vote. Voting is their right, not their duty. If voting would revive memories that they would prefer to leave undisturbed, they need not vote. In what follows I discuss what issues should be included in a referendum and when referenda should be used.

b) Who Should Decide Who Should Be Included in the *Demos* and When Should Democracy Be Employed?

This section argues for two panels, the first choosing the second, where the second is given the power, within the limits noted above, to choose the *demos* and assign the weight of the electorate's votes. The UN General Assembly or some other globally representative body chooses the first panel that should be composed of experts in international law, transitional justice, and the society in transition. No one with a conflict of interest or potential bias towards an individual or people in question should be permitted to serve on either panel. This first panel chooses the second. The second panel should be a combination of experts like the first panel, but it should also be composed of local experts and potentially even individuals from the society in question so long as the individual in question was known for probity and unbiased reasoning. This second panel would have the power to decide when and how transitional justice decisions would be put to a popular vote and who would constitute the *demos*.

This two tiered approach aims to limit bias. Understanding, acknowledging, and limiting the effects of prejudice are vital to ensuring any decision process is fair. Local actors on any side of a conflict, especially in the years immediately following conflict and often decades on, likely hold strong opinions and may be deeply biased if not downright bigoted. Bias is impossible to eliminate, and judging if someone is unfairly biased is difficult, controversial, and will vary from person to person. This is necessarily an imperfect and subjective exercise. Because members of the international community – not those related in any way to the conflict – are most likely to judge fairly whether others are fit to be judges in the second order, they should be the only ones primarily empowered to choose who will sit on the second panel.

The second decision of who should and should not be empowered to make other important decisions may have more leeway. Citizens of the state involved, such as Nelson Mandela or Desmond Tutu in South Africa, should be eligible to serve as panelists in this second round of decision making. In a process similar to the ideal of vetting jury members before they are permitted to serve, the first panel should exclude anyone who holds views that would compromise fairness. Consequently, belligerents and their representatives from any side should be prohibited from serving, save for exceptional circumstances. The second panel is not a peace conference. The specifics of how these people would be chosen will have to be left aside here, but one final point is important. The first order judges will have to balance local involvement and its attendant legitimization, capacity building, and so on, with the possibility of bias.

My victim-centered account leaves open complicated theoretical questions the answers of which vary among transitional societies. No solution should be universally applied because of each society's unique circumstances. For example, the second panel may consider the following issues. Should it matter to what extent the victims were harmed? Should it matter what size the victimized group is compared with the potentially victimized group? What if the threats to potential victims are severe or the probability of any harms are minuscule? What if the victims and potential victims belong to distinct ethnic, religious, racial, political, or other groups? Which courts, e.g., local, national, or international, should be employed, or in what combination and why?

Another issue the second panel should consider is the threat to security of the voters. Some might believe that by allowing voters to decide to some extent the fate of the perpetrators, the panel is unfairly endangering those very people they should be protecting because if they vote for retributive punishment, the accused may target the voters for more abuse. Especially since there is empirical support for leaders abusing human rights more as threats against their hold on power increase, the second panel should not underestimate this threat (Schimtz and Kikkink 2002: 518-9; Davenport 2007).

Each step of the decision process risks devastating mistakes. But I know of no way to eliminate or mitigate these hazards more systematically without considerable additional reforms such as bolstering peacekeeping or forming a global rapid reaction force tasked with arresting those indicted by the ICC and other

international courts. Although unsatisfying, my proposal is the fairest proposal possible for our nonideal world.

Others may claim that my approach merely rubber-stamps democracy, conveniently legitimizing it when it fits the interests of the international community and overruling it when having people vote might inconvenience powerful states. Insulating both the first and second set of experts from the corrupting influences of international power is vital here just as it is for any international court or system of justice. The eighteen judges of the ICC are a good example of the sort of individuals who should serve on the first panel because of their international stature and expertise. The ICC requires one national of each state can serve as a judge, which should also be a rule for the first panel to ensure as much global support, and as little bias, as possible. The next question is what issues should be put to a democratic vote. These are decisions that the second panel will make.

c) What Should Be Included in Democratic Decision Making?

This section suggests that only some issues should be put to a democratic vote, especially those of amnesty, prosecution, or truth commissions. Because each country and situation is unique, the choices available to each society are too numerous to list and a full taxonomy of options is beyond the scope of this chapter. To illustrate, Daniel Philpott identifies six general components of transitional justice (Philpott 2009: 398). Greenawalt dissects amnesties in seven different ways (Greenawalt 2000: 195). Moreover, the discussion here will necessarily be somewhat general since the actual decisions of what to include are left up to the second panel.

Given these constraints I offer some general remarks and focus on the peace vs. punishment tradeoff. Some of the main choices include the following:

1. Trials
2. Amnesty
3. Truth Commissions
4. Reparations

And, all likely have varying effects on

5. Democratization
6. Democratic Consolidation
7. Possible Resumption of Conflict

The second panel should likely turn the choice of which of these to favor over to the *demos* to decide. Notice that these choices are broad, not specific. The second panel must make many decisions on its own or else there may simply be far too many issues to vote on realistically, and the result might be incoherent. Imagine if a vote for a trial had to include everything from how evidence should be collected to where the trial should take place to the sentencing guidelines. The sheer number of ballot issues as well as probable apathy of many voters on many issues might render the entire process dysfunctional. Specific items to include or exclude will be left up to the second panel to decide, since, for instance, one community may have unusual sentencing traditions, and the panel may decide it is appropriate to adopt these

traditions. I have offered a sketch, and only a sketch, of a fairer procedure to decide transitional justice issues.

To summarize, I have suggested that democratic decision making may be preferable to other options for transitional justice decisions, but that this decision making should be (a) limited by a group experts who decide whether there should be a vote at all and who can vote and (b) on which issues (c) based on past and future victims whose relative weights in a referendum should be conditioned on if they could be considered victims twice or only once.

Conclusion

Now that the components of the theory of partially democratic transitional justice have been laid out, I will discuss some possible implications. It follows from the arguments here that different groups of people should be empowered to vote given different transitional justice decision metrics because different decisions may cause different people to be potential victims. The second panel will have to conduct a careful investigation into which groups of people may be harmed, and then, first, weigh whether these different groups should get to vote at all and later decide which subset could be victims. Because the victims who have already been wronged will remain constant no matter the decisions proposed, this subset of the *demos* will remain constant, as will those others who are excluded for other reasons, leaving only a fraction of the potential *demos* mutable.

None of my arguments supports abandoning a local population if powerful actors inflict further human rights abuses, whether these harms are a result of

choices made by the *demos* or for any other reason. Conversely, the international community has a limited responsibility to protect vulnerable populations (ICISS 2001, Evans 2008, Bellamy 2009), especially given recent evidence that peacekeeping significantly decreases the probability of a resumption of civil conflict (Collier 2009: 83-7, 95-100). My proposal is one for nonideal conditions, taking the global political realities as they are, where so often local, national, and international actors fail in their responsibilities.

One objection against my entire theory is that the decision to allow or withhold a democratic decision is not made democratically. Another option would be to put it to some group of people, first, asking them the question of whether there should be a vote on transitional issues or whether they should be left to a group of specialists, without a vote. But even this seemingly more democratic means of decision-making falls back on the boundary problem of who should decide this first question (Goodin 2007: 52). Both ways are problematic, though for different reasons. I argued above that just because some decision is not made by a majority does not, *ipso facto*, delegitimize it or make it antidemocratic. Fairness, not full democracy, is my overriding aim. But could any of this actually work?

Whether this is consistent with international criminal law and whether this account could ever be implemented in practice are fair questions. I address each in turn. First, this theory is in harmony with the international criminal law codified in the Rome Statute. Liberal legalists might object that the intentional rule of law generally requires prosecutions and prohibits amnesties (Orentlicher 1991; cf. Orentlicher 2007), but the Rome Statute presents a more nuanced picture. The ICC's

prosecutor has some leeway in her choice of whether to prosecute according to sections 53, 1. (c) and 2. (c), which allow the prosecutor to *not* “investigate” or “prosecute” crimes if not doing so would best serve the “interests of victims” and “the interests of justice” (Rome Statute 1998). Under the Rome Statute’s section 16, moreover, the UN Security Council possesses the power to indefinitely defer ICC prosecution for one-year periods under Chapter VII of the UN’s Charter, which grants the UN power to maintain peace.

Second, many societies are destroyed to an extent difficult to imagine: in Timor-Leste, for example, 70% of its infrastructure in 1999 was in shambles (Kerr and Mobekk 2007: 107). Obtaining a free and fair vote may be practically impossible: how are voters to be located, protected, informed of their rights, and votes collected and counted, all in a safe, efficient, and timely manner? Two responses are warranted in relation to whether votes could actually be held in recovering societies. First, fair votes have occurred in tough places, such as in South Sudan in January 2011. Second, even if fair voting cannot be held given current constraints, this chapter already has a way for the panels of experts to make this decision and seek other methods of transitional justice. Perhaps more importantly, this second problem offers a critique of current methods of attempting to implement justice without a real peacekeeping force, either domestic or international. This should be seen as a call to reform other institutions and procedures, rather than as reason not to seek fair methods of post-conflict adjudication. Ending with an example may be helpful.

Constructing a theory with a certain set of circumstances in mind, and then testing it against another case often exposes flaws in the original theory or lends it support. The indictment of Sudan's president, Omar al-Bashir, for his crimes in Darfur since 2003 is a difficult case for my theory since there were few good options. This case also extends my theory because Sudan is not (yet) a case of transitional justice, but of international criminal justice. Up to 400,000 people have been murdered since the most recent conflict ignited in 2003 and many have called it genocide (Kristof 2009). Although the ICC did not charge Bashir with committing genocide, he was charged with war crimes and crimes against humanity (Human Rights Watch 2009). The head prosecutor of the ICC, Luis Ocampo, issued an open indictment of Sudan's president (and others), despite threats from Bashir that he would expel aid organizations if he were indicted. Over a million people who relied on aid organizations for help were put at risk when Bashir made good on his threats and expelled 13 organizations (Human Rights Watch 2009). Note this is not the typical peace vs. justice trade off since there was no peace agreement and the threat was not a direct escalation but was rather a way to harm people that the international community was clearly concerned about. The people of Darfur had no say in Ocampo's decision to prosecute. My theory would provide a panel of experts to decide if the people who have suffered in the years of violence should have a say in this decision, and, if so, whether the people should have voted on the issue. Even if Bashir acted identically or worse, the process would have been fairer than an Argentine judge making choices for others from a comfortable office in the Netherlands.

Conclusion

In this dissertation I contributed to theories of human rights, debates about humanitarian intervention and state sovereignty, theories of international criminal law and principles by which the ICC should act, the literature on transitional justice, and democratic theory. I argued that if there is an individual right to democracy, then other substantive rights must be guaranteed in order to exercise that right. Protecting and exercising these rights sometimes justifies breaches of state sovereignty by the ICC and in times of transitional justice. Rather than further summarizing my contributions in the conclusion, I will discuss the limitations to my research, policy implications, and areas of future research.

Limits to My Arguments

Every argument is limited by its assumptions because only individuals who accept the premises will accept the conclusions. One of the contested assumptions

that I make in my first chapter is that everyone has an individual moral right to democracy. Some dispute this assumption (e.g., Cohen 2006; Altman and Wellman 2009). In order to convince these objectors, I would have to develop a theory of why everyone deserves such a right or at least show why some of the leading proponents of not having an individual right to democracy are incorrect (for one recent contribution, see Christiano 2011). Yet because chapters 3-5, and to some parts of chapter 2, do not require acceptance of the arguments in chapter 1, those who reject an individual right to democracy can still be convinced of my other arguments without putting their belief in abeyance.

Another assumption that I accept that deserves a detailed critical examination is the view that states have primary responsibility to guarantee their citizens' human rights and that supra-state institutions have secondary responsibilities. Dr. Jaggar pressed me over this issue several years ago and it remains a topic that I want to address. Whether states should have primarily responsibility and supra-state actors should have secondary responsibility to guarantee individuals' human rights is an especially interesting question in light of the increasing power of some actors below, above, and outside of state control such as NGOs, the UN, the EU, the ICC, corporations, and others. Debates about the responsibility to protect (e.g., Evans 2009), and debates about what role the state does and should play in domestic and international affairs, make this topic especially pressing. Although rare, those who do not believe that states or supra-state institutions have any responsibilities to guarantee individual rights may remain unconvinced by chapters 2-5.

Another objection related to institutional responsibility is that I under specify responsibility holders in some cases. Dr. Mapel pushed me on this question in chapter 2 by asking which specific actors should have the responsibility to intervene and how should this responsibility be distributed among different actors (see Pattison 2010). The same question can apply to chapter 5. Which actors, some might ask, have the responsibility for setting up the transitional justice institution that I argue for there? These are important theoretical and practical questions. How institutional responsibility should be assigned for various issues is one area that I want to think more about and address in more detail in the future, but it is such a large question that I could not address it fully here. Those who are looking for a theory of how these responsibilities should be specifically assigned may remain unsatisfied. However, I see the questions I address as somewhat different than these. Although some may think the questions I ask cannot be addressed independently of which actors must be assigned this responsibility, I believe the two questions can be separated to some extent. In chapter 2 I suggest that institutions, not individuals, should have the responsibility to intervene militarily or non-militarily but I do not develop a full theory of how these responsibilities should be assigned. The latter topic is undoubtedly vital. I offer a brief, tentative argument about how they can be assigned, but making a more complete argument will have to wait.

A final limitation that both Dr. Ferguson and Dr. Jaggard pushed me on is the right authority precept of just war theory. Who decides whether an intervention is humanitarian? Who judges whether the proportionality condition has been met? This is another large topic that deserves more consideration that I was able to

devote to it in the dissertation. It is especially pertinent for chapter two where I discuss the morality of non-military humanitarian intervention because the same worry applies here as it does for military humanitarian intervention. As I showed with the Iraq sanctions case, one actor that some turn to as a legitimate intervener, the UNSC, does far too little to ensure compliance with proportionality and other just war conditions. A significant problem for both military and nonmilitary humanitarian interventions, this is a topic I plan to address in the future. Despite these limitations, are there any policy recommendations that emerge from the dissertation?

Policy Implications

If my arguments are sound, some policy recommendations emerge from my dissertation that recommend departing significantly from current practices. Before summarizing these, let me note that the lack of consensus on empirical findings limits some policy recommendations. For instance, the lack of consensus on whether and under what conditions different types of economic sanctions work means that policy recommendations should be taken as tentative and that they should be reconsidered as new findings become available. This is an important point because making policy recommendations based on poor data or analysis is just as bad as making decisions without empirical information and I do not want to overstretch my arguments or the data on which some of my arguments are based.

The most general policy recommendation that follows from my arguments is that in order to be democratic, every polity must guarantee numerous substantive

individual rights. This applies equally to domestic and international spheres of governance. Many people currently think of democracy as an institution of domestic government. Chapter 1 weakens the degree to which this view can be consistently held. A polity should not be categorized as fully democratic even if domestically it is democratically ideal when its foreign policy actively violates or undermines others' basic democratic rights. My arguments show that democracy requires some balance of protecting basic democratic rights domestically and internationally. This policy recommendation requires deep reforms from states but also from nonstate and supra-state organizations that all too often violate individual rights in the name of democracy or who claim to be supporters of democracy.

Another reform that should follow from my argument about basic democratic rights is a revision of how democracy is commonly measured. One of the most widely used measures of democracy by political scientists and others is known as Polity IV. It is a compilation of six measures including "executive recruitment" (how executives are chosen and whether this done freely and fairly), "constraints on executive authority," and "political competition" (Polity IV). My arguments suggest that this index is a deeply incomplete measure of democracy. Any measure of democracy should also include the degree to which basic democratic rights are respected both domestically and abroad. Since other organizations already measure human rights, aspects of these measures could easily be incorporated into such popular measures of democracy as Polity IV.

The ICC is another institution that requires significant policy reforms if my arguments in chapters 3 and 4 are correct. One of the most important changes the

Court's prosecutor should make is to investigate and indict nonviolent international criminals that may have committed crimes against humanity. This is one of its largest failures of the Court to date. It should modify another policy as well. By not indicting most underlings, the prosecutor is tacitly informing subordinates that they will not face punishment by international criminal law. By focusing exclusively on the most culpable violent violators of the Rome Statute, Ocampo is not using the full powers of the Court to deter potential international criminals. Potentially the difference between life and death for individuals at risk of future international crimes, the ICC should reform its prosecutorial strategy to increase deterrence. Unless and until the ICC adopts these policies, its deterrence capabilities will continue to be unnecessarily disabled.

One possible objection to these policy recommendations is that as of 2011 the ICC is too fragile to make such bold moves because member countries might quit in protest, destroying the Court. We should take this worry seriously. It is surely better to prosecute some than to have the ICC fail as the League of Nations did. There are several responses to this astute objection. First, notice that this is not an objection to my moral or legal argument, but a political calculation for the near term. Second, there is a way to take this objection into account that still allows the ICC to effectively use its powers. Rather than prosecuting individuals that committed only nonviolent international crimes, the ICC should initially prosecute individuals that committed both violent and non-violent crimes, such as Robert Mugabe. Such a strategy would make it more politically difficult for member states to undermine the Court than if the ICC began prosecuting those who committed only nonviolent

offenses. At the same time, this strategy would establish a jurisprudence record of indicting individuals on charges of non-violent crimes so that the nonviolent cases that follow would be less controversial. Thus, for political reasons, in the short run, the ICC perhaps should not indict all individuals who may have committed only nonviolent international crimes.

A less controversial ICC policy prescription is my suggestion that the prosecutor should indict subordinate international criminals. Other international tribunals have already done this – indeed the ICTY began with such indictments because the highest-level offenders eluded prosecution immediately after committing offenses (May 2005: 116 and chapter 7 more generally). The ICC itself has also already prosecuted some of these second in command individuals. Member states will likely find these additional prosecutions less controversial than the ones targeting nonviolent offenders.

In addition to these strategies that the ICC can exercise alone, the ICC should coordinate with other institutions such as the World Bank. Chad's use of World Bank money to build an oil pipeline is illustrative. The Bank lent Chad's dictator money to build a pipeline conditioned on his promise to use some of it for development projects. The pipeline returns over \$1 billion per year to the dictator. Rather than depending on the good will of such dictators – which is basically what the WB did – the WB should coordinate with the ICC to provide a stick should individuals not adhere to their agreement and commit violent or nonviolent international crimes, as Deby may have done. Despite the ICC's weak enforcement mechanisms, it has more

opportunity to enforce some policies than the WB does and it should use these powers.

Finally, my policy recommendations for transitional justice call for a new institution. Consisting of two tiers of panels, the latter of which has the limited authority to decide when to empower a *demos* and whom that *demos* consists of, the new institution is vital for democratizing transitional justice mechanisms. The first panel should consist of international experts so that bias is minimized. The international experts will be empowered to choose the second panel, which can include individuals from the territory or region in question. The *demos*, consisting of victims of past abuses and potential victims of future abuses, will decide by vote on the type of transitional justice mechanism the society should use so long as voting in this referendum does not jeopardize their basic democratic rights. As a significant shift from the diverse practices known to transitional justice societies, this policy recommendation incorporates democratic critiques of transitional justice mechanisms while still protecting the individual rights of people at risk as much as possible.

Future Research

I plan to build on the research agenda that my dissertation represents. Starting with some of the gaps that I identify above, I move between specific ideas that are appropriate for paper length projects, and broader research interests that I can pursue only over the longer term.

How individual rights relate to democracy is one interesting topic where many questions remain. I want to think carefully about the implications from chapters 1 through 3 and apply them to more cases. One area where I have already begun to do this is for the limits of legitimate democratic power, where my arguments have surprising implications. In one paper, I shall argue that the legitimate domain of democratic power is far more limited than is widely accepted. This is the case because in most contemporary liberal representative democracies, as well in widely accepted theories of liberal representative democracy, many areas that are subject to democratic control should not be because they can undermine the basic democratic rights of citizens. Not only should domestic power be more limited than it is and currently theoretically accepted to be, but so too should foreign policies as well as the power of global institutions such as the World Bank, IMF, and UN.

Until democratic power is further constrained, democratically elected leaders may face choices that dirty their hands (Walzer 1973). I plan on further exploring Walzer's and others' discussions on the problem of dirty hands building on the arguments from my dissertation. Besides making moral arguments in the tradition of Walzer and his critics, I will incorporate whether contemporary international criminal law can be invoked in any cases of dirty hands, domestic or international. My tentative thinking is that ICL may offer a way to reach Walzer's conclusion of punishing leaders if they dirty their hands that was not available at the time of Walzer's publication. If even if such an argument is legally valid, I may argue

that some leaders should not be prosecuted because they minimize how dirty their hands are.

Another area of further area of research relates to the responsibility for protecting basic democratic rights. Democratic governments have a special responsibility to their own citizens, many believe. There is a presumption in favor of this view. My argument in chapter 1 does not make a distinction between domestic and international protection of basic democratic rights. One might assume that a country's leaders have the responsibility to favor protecting the basic democratic rights over foreigners', but I gave no such argument and it is not obvious to me that one should take precedence over the other. Asking whether state governments have a special responsibility to their citizens in the sphere of protecting basic rights, and how this responsibility relates to the responsibility to protect the basic democratic rights of foreigners is a fascinating area of research that I plan on exploring. Staking out a principled position on how to balance domestic and international concerns for certain types of rights will be an interesting project.

Although it is still widely accepted that states have some degree of sovereignty, a few questions arise out the contemporary assumption that states have the primary responsibility, and international institutions have secondary responsibility, to guarantee human rights. Might other actors such as corporations, NGOs, IOs, or others, share primary responsibility to guarantee and enforce individuals' human rights? In other words, what, if anything, makes states and international institutions morally appropriate for guaranteeing primary and secondary responsibilities for human rights? Which actors or combination of actors

should assume responsibility if those primarily responsible fail to guarantee individuals human rights? Should it matter if few or many individuals' rights are being violated? Should it matter whether there is a capacity or will problem? Each of these questions remains an interesting area for future research.

Asking a similar question of right authority arises out my arguments. Who should judge whether state sovereignty should be violated for nonmilitary or military humanitarian interventions? Should, and how can, democratic theory inform the question of right authority? These questions and other around the just war precept of right authority is another area of research that I plan to pursue.

Over the longer term I plan on contributing to debates about global justice, international law, democratic theory, and human rights, as well as linking these topics to environmental political philosophy. Global climate change poses interesting challenges to contemporary theories of human rights, institutional responsibility, democratic theory, and international law through how it will affect of future generations, foreign impacts of domestic actions, dilemmas in development because development has heretofore necessarily increased global greenhouse gas emissions, and more (Vanderheiden 2008; Moellendorf 2009; Gardiner 2011). The research could move in two directions. I could use the arguments on topics other than climate change I develop here and elsewhere to ask how they might apply to debates in environmental political theory. The theory building could move in the other direction. I could use theories developed in the global climate change literature to interrogate the current and future research.

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